PKB v Director of Public Prosecutions & another (Petition E045 of 2023) [2024] KEHC 4588 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4588 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E045 OF 2023

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

PKB ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

Indefinite detention at the president's pleasure, without judicial oversight, contravened the principle of judicial independence

The petitioner challenged the constitutionality of section 166 of the Criminal Procedure Code (CPC), which allowed indefinite detention of persons found guilty but insane at the President's pleasure. The High Court held that section 166 of the Criminal Procedure Code was unconstitutional as it violated the petitioner's rights under the Constitution, particularly the right to a fair trial, human dignity, and non-discrimination. The indefinite nature of detention at the President's pleasure, without judicial oversight, was contrary to the independence of the judiciary as guaranteed by Article 160 of the Constitution. The court also found that the petitioner had been denied adequate mental health treatment, infringing on his rights under articles 47 and 50.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – rights to life, fair trial, right to fair administrative action, equality and freedom from discrimination, human dignity, access to justice, and the freedom and security of the person - sentence of detention at the President's leisure – verdict of guilty but insane - whether section 166 of the Criminal Procedure Code, which mandated detention at the President's pleasure for those found guilty but insane, violated the rights to a rights to life, fair trial, right to fair administrative action, equality and freedom from discrimination, human dignity, access to justice, and the freedom and security of the person – Constitution of Kenya, articles Article 22,24,25,26(1) 27, 28, 29, 48, 50 (2) (b), and 160; Criminal Procedure Code (cap 75) sections 162 and 166; Penal Code (cap 63) sections 203 and 204.*

Constitutional Law *– separation of powers – judicial powers – sentencing powers - judiciary vis-à-vis executive - sentence of detention at the President's leisure – verdict of guilty but insane - whether the delegation of judicial*

sentencing to the executive under section 166 of the Criminal Procedure Code breached the principle of separation of powers – Constitution of Kenya article 160; Criminal Procedure Code (cap 75) sections 162 and 166; Penal Code (cap 63) sections 203 and 204.

Brief facts

The petitioner was charged with murder in 1988. Due to his mental condition (triggered by cerebral malaria), he was found guilty but insane and sentenced under section 166 of the CPC to be detained at the President's pleasure. Bor has been incarcerated for over 34 years, during which his mental state has reportedly improved. He filed a petition challenging Section 166 of the CPC, asserting that it violates his right to a fair trial, protection from inhumane treatment, and access to justice. His mental health was re-evaluated in 2023, and he was found mentally fit. The petitioner sought his release and the declaration of Section 166 as unconstitutional.

Issues

i. Whether section 166 of the Criminal Procedure Code, which mandated detention at the President's pleasure for those found guilty but insane, violated the rights to a rights to life, fair trial, right to fair administrative action, equality and freedom from discrimination, human dignity, access to justice, and the freedom and security of the person.

ii. Whether prolonged detention of the petitioner without periodic reviews constituted cruel, inhumane, or degrading treatment.

iii. Whether the delegation of judicial sentencing to the executive under section 166 of the Criminal Procedure Code breached the principle of separation of powers.

Held

1. The anchor for this interpretive approach by the Kenyan people when the Constitution was promulgated in 2010 was traceable to article 20 of the Constitution.
2. Section 166 of the Criminal Procedure Code granted the executive the powers that flew in the face of the doctrine of separation of powers as it allows the president to subsume the role of the judicial officer. The President was granted the power of mercy. In the event that a person was found to be guilty but insane, it was upon the president to order the detention of such person in a mental hospital or prison awaiting a report from the officer in charge of the institution. Upon the report being completed it was to be submitted to the president who may give orders he thought fit. That created a scenario where the president was given a judicial officer role. However, sentencing was by and large a judicial function and therefore, section 166 of the Criminal Procedure code flew against that doctrine.
3. The impugned sections were already declared unconstitutional in several decisions. The administration of criminal justice in Kenya was embodied under article 50 of the Constitution on fair trial rights which were not derograble in any circumstances. To the extent, the law guaranteed rights of an accused person at various levels of the criminal process. One of the touchstone was the principle of the presumption of innocence until proven guilty.
4. The Constitution had balanced the rule of law and the crime control models The Constitution implicitly provided that rights and fundamental freedoms emanating from the nature of mankind were inviolable and inalienable unless they fit within the spectrum of the limitation clause.
5. It was a statement of the due process of law in article 29 of the Constitution which provided that no one shall be deprived of his/her liberty except on such grounds and in accordance with such procedure as established by law.
6. One was presumed innocent until the contrary was proved. Presumption of innocence was confined to the *mens rea*, being guilty on the part of the perpetrator, which pre-supposed the presence of mental faculties which enabled the suspect or accused to have willed his/her crime. The other crucial criteria was *actus reus* elements. That was constituted by an act or deed or commission or omission or in some cases the occurrence of and event in which the offender was involved and it may include surrounding circumstances, consequences and results of the acts or omission. Intention of a suspect or an accused person indicted by the Director of Public Prosecution of the offence under article 157 (6) and (7) of the

Constitution covered the case of a person who knew that the achievement of his purpose to commit the crime would necessarily cause the expected result in question in the absence of some supervening event. In Kenya's Penal system, towards advancement of the criminal justice administration, a person was not generally liable to be found guilty on convicted of either non-serious or serious crime where the prohibited result was not only un-intended but also unforeseen. *Mens rea* therefore was at the core of both procedural and substantive justice.

7. The evidence of the prosecution should be examined against the evidence offered by the accused in addition to any available defences known in law such as the defence of insanity. A distinction ought to be drawn in a trial of an accused person under article 50(1) of the Constitution between the factual guilt, that was what the accused did as a matter of fact, with the requisite *mens rea*, and the legal guilt being what the prosecution was able to establish beyond a reasonable doubt and in conformity with due process that the accused performed the criminal act. Those were the difficulties which if anything, the presumption of innocence rested as a constitutional imperative.

8. The reality practically of course was that once the suspect of a criminal offence was arraigned before a court of law, the mind-set of many players from the National Police Service, the investigating agencies, the EACC and even the judicial officers in the criminal justice system, was that the suspect was probably guilty. The attitude was one of the very urgency in which the business of plea taking in non-serious offences was undertaken with the dangers inherent of a threat to infringement of the provisions of article 50 of the Constitution on fair trial rights. It was inevitable that many of the suspects in the criminal justice system were ignorant of the criminal law defences to an offence, for example self-defence in section 17, provocation in section 207 and 208, excusable or justified homicide as contemplated in article 26(3) of the Constitution and other enabling statutes. A common allegorical personification depicts justice as a woman who was holding a set of balance scales, comprising a balanced beam and two pans. The evidence of the prosecution was to be weighed on the pan of the scales, with evidence for the accused being weighed on the other.

9. In due process, some of the challenges that may arise was whether that accused person in the dock, a preliminary inquiry has been carried out by the trial court, as to his/her fitness to stand trial. Every person adjudged before the criminal court in Kenya was presumed not to suffer from a mental illness or mental defect unless the contrary was proved by way of a psychiatrist medical report, yet the person may lack the capacity to appreciate the wrongfulness of his/her actions or act in accordance with an appreciation of his/her personal circumstances of the wrongfulness of his/her acts of omission or commission.

10. The judgment of the trial court, the petitioner was found guilty of murder but declared insane. It was conceivable from the record that the petitioner suffered from a serious psychiatric disorder triggered by cerebral malaria. Mental illness was a medical condition and it was important that measured evidence be adduced by the expert testimony to assist the trial court to consider the psycho-legal implications. That condition suffered by the petitioner had its validity relating to the blame worthiness of the petitioner's conduct to justify any imposition of a detention order by the State.

11. The presumption of innocence in article 50(2)(a) of the Constitution would be infringed whenever there was a possibility of a conviction despite the existence of a reasonable doubt and that of the same characteristics of a person presumed to suffer from a mental illness or defect to render him not criminally liable for the offence. If taken within the context of article 25(a), the fundamental rights and freedoms from torture and cruel, inhuman or degrading treatment or punishment which may not be limited in our constitutional dispensation was weighed in against the State by having him detained at the pleasure of the President.

12. The pre-rogative of mercy under article 133 of the Constitution for the last 34 years, seemed not to have reviewed his case with a neutral and open-minded approach about the petitioner's innocence for reason of mental infirmity. Primarily, the petitioner presumably was detained without parole unlike other

prisoners whose sentences are reviewed from time to time to receive pardon from His Excellency the President. The court strongly believed that the executive has extensive discretion to define crimes and defences that may be brought to its attention and to allocate the burden of persuasion appropriately to affect the degree of culpability.

13. What the impugned section did was to import compulsory incarceration or institutionalization of the accused person apparently for his own safety and the public at large. The implication was that in the manner it was executed it threatened or infringed the provisions of article 29 of the Constitution which provided that every person had the right to freedom and security of the person which included not to be deprived of freedom arbitrarily or without just cause, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. The court order of detaining the petitioner in the actual sense deprived him of his right to freedom and security. During the period under review for 34 years, the petitioner had not been serving any sentence known in law in view of the findings by the judge that he was mentally insane to appreciate the initial charge of murder preferred against him.

14. The conception of human dignity as an intrinsic value on account of the detention by the executive order of the precedency in compliance to the scheme detailed in the impugned provisions manifested infringement and violations guaranteed in article 28 of the constitution. The right to be treated with dignity was lost. There could be no argument that the state took upon itself to order the detention of the petitioner while fully aware that he suffered from a disability of the mind at the time he went through the criminal proceedings.

15. The Constitution on most cases demanded of the impartial entity may it the executive or the legislature to act within the bounds of article 10 of the Constitution on National values and Principle of Governance. The symbolic function of the head of state helped the court to understand and explain an apparent anomaly with section 166 of the Criminal Procedure Code in so far as the right to be detained at the president's pleasure was concerned. There was every reason to state that the code in which provisions under section 166 were anchored ought to be revisited by the legislature with an endeavour to have them comply with the Constitution.

16. As much as the country has largely been implementing the provisions under section 166 of the CPC the owners and purpose of it was inevitably unconstitutional. The only purpose of rationality was to have the petitioner detained in terms of his own security and that of society on a highly debatable and contra version matter of policy on the right to presumption of innocence and the blameworthy state of mind with which the petitioner might have attributed to commit the offence which the trial court conclusively stated that he was not criminally liable for reason of mental state with intersect with legal notions of insanity.

17. Before trial, an accused person was required to go for a mental assessment test to determine if he was fit to stand trial. A finding of guilty but insane was ironic as the fact that he was insane would mean that he did not have the capacity to understand the charge sufficiently in order to answer to it. It follows that putting such a person through a hearing is a breach of his constitutional rights. The provisions of section 166 of the CPC were unfair. Section 166 of the CPC the direct reverse of the provisions founded in article 22,24,25,26(1) 27, 28, 29, 48, and 50 of the Constitution. Even article 133 of the Constitution on the power of mercy contained provisions which were constitutionally responsive on the Bill of Rights but which were never taken advantage of in the formulation of insanity as established by the trial court that the petitioner though prosecuted, found guilty and convicted him for the offence of murder he suffered from mental illness at the time of the commission of the offence to form the necessary *mens-rea* to commit the crime.

Petition allowed.

Orders

i. *Declaration was issued that the provisions of section 166 of the Criminal Procedure Code of the Laws of Kenya were contrary to the provisions of article 22,24,25,26(1) 27, 28, 29, 48, 50 (2)(b) and 160 of the Constitution and were null and void.*

ii. *The review of the conviction of guilty but insane be made and the said conviction be replaced with a finding of not guilty for reason of insanity.*

iii. *Order issued directing the 2nd respondent to initiate the process of amending section 166 of the Criminal Procedure Code.*

iv. *The petitioner in view of section 166 of the Criminal Procedure Code as read with article 133 of the Constitution did not seem to have a really possibility of release by an exercise of prerogative of mercy and therefore sufficient cause to have disproportionate detention reviewed and set aside.*

v. *Order made that the officer commanding prisons Eldoret that hosted the petitioner should escort the petitioner to Moi Teaching and Referral Hospital for a psychiatric report. That would inform the court on the possibility of the petitioner's right to access health rights to be guaranteed by the state.*

Citations

Cases

Kenya

1. *Ali Said Abdallah v Republic* Petition 49 of 2016; [2020] KEHC 7245 (KLR) - (Mentioned)
2. *AOO & 6 others v Attorney General & another* Petition 570 of 2015; [2017] KEHC 6022 (KLR); [2017] eKLR - (Mentioned)
3. *David Kipkorir Serem & Dismus Kiplangat Kithu v Republic* Criminal Appeal 66 & 66A of 2016; [2021] KEHC 7689 (KLR) - (Mentioned)
4. *Elijah Ngotho Njoroge v Republic* Miscellaneous Criminal Application 35 of 2019; [2020] KEHC 4389 (KLR) - (Mentioned)
5. *Hassan Hussein Yusuf v Republic* Criminal Appeal 59 of 2014; [2016] KEHC 5316 (KLR) - (Mentioned)
6. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Applied)
7. *Jayne Mati & Another v. Attorney General & another* Petition No 108 of 2011; [2011] KEHC 4292 (KLR) - (Applied)
8. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Mentioned)
9. *Kenya Human Rights Commission & Community Advocacy & Awareness Trust (Crawn Trust) v Non-Governmental Organizaztions Co-ordination Board & Law Society of Kenya* Petition 404 of 2017; [2018] KEHC 8915 (KLR) - (Applied)
10. *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* Petition 226 of 2020; [2022] KEHC 114 (KLR) - (Applied)
11. *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* Petition 226 of 2020; [2022] KEHC 114 (KLR) - (Explained)
12. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Mentioned)
13. *Republic & 6 others v Chief Magistrates Court, Nairobi & 4 others; Chudasama on His Own Behalf and on Behalf of the Estate of Pooja Hinesh Kantilal Chudasama (Exparte Applicant); Kamau & 5 others (Interested Parties)* Miscellaneous Application 473 & 478 of 2006 (Consolidated); [2007] KEHC 2940 (KLR) - (Mentioned)
14. *Republic v CMW* Criminal Case 43 of 2015; [2018] KEHC 3556 (KLR) - (Mentioned)

15. *Republic v Ibrahim Kamau Irungu* Criminal Case 7 of 2018; [2019] KEHC 6733 (KLR) - (Mentioned)
16. *Republic v SOM* Criminal Case 6 of 2011 - (Mentioned)
17. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Applied)
18. *Wakesho v Republic* Criminal Appeal 8 of 2016; [2021] KECA 223 (KLR) - (Mentioned)
19. *Wakesho v Republic* Criminal Appeal 8 of 2016; [2021] KECA 223 (KLR) - (Applied)
20. *Yeri v Republic* Criminal Miscellaneous Application 78 of 2014; [2021] KEHC 182 (KLR) - (Mentioned)

South Africa

1. *S v Zuma* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995) - (Applied)
2. *Bernstein and Others v Bester and Others* (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996) - (Applied)
3. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) - (Applied)
4. *Minister of Health v Treatment Action Campaign* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) - (Mentioned)

United Kingdom

Rex v Pritchard (1863)7 C&P 303 - (Mentioned)

United States

Pate v Robinson 383 US 375 (1966) - (Applied)

Canada

Egan v Canada [1995] 2 SCR 513 - (Applied)

Australia

R v Presser (1958) VR 45 - (Applied)

Regional Court

Emma d/o Mwaluko v Republic [1976] LRT 197 - (Mentioned)

Trinidad and Tobago

Ramanoop v Attorney General TT 2003 CA 19 - (Mentioned)

Texts

1. Blackstone, W., (Ed) (1769), *Commentaries on the Laws of England* Oxford: Clarendon Press Vol IV p 250
2. Republic of Kenya (2018), *Third periodic report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017 : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Statutes

Kenya

1. Constitution of Kenya article 1(3); 10(2)(b); 10(2)(c); 21(3); 22(1); 25(a); 27(1); 29(f); 47(1); 47(2); 48; 50(1); 50(2)(b); 50(5)(b); 133; 156; 157(6); 157(7); 159; 160; 259 - (Interpreted)
2. Criminal Procedure Code (cap 75) section 166- (Unconstitutional)
3. Criminal Procedure Code (Cap 75) section 162(4); 162(5)- (Interpreted)
4. Penal Code (cap 63) section 203; 204- (Cited)

Advocates

None mentioned

JUDGMENT

Before Justice R Nyakundi

Oduor Munya & Gerald Attorneys

1. The petitioner instituted this cause vide a Petition dated 24/07/2023 seeking the following orders;
    1. A declaration that section 166 of the *CPC* contravenes art 50(2)(b) and 160 of the *Constitution*
    2. A review of the conviction of guilty but insane to be replaced with a finding of not guilty by reason of insanity.
    3. An order that the petitioner be subjected to mental health re-evaluation and thereafter released from custody if found to be free of a mental infirmity.
    4. An order that the 2nd respondent initiates the process of amending section 166 of the *CPC*.
    5. Any further orders, writs, directions as the court may deem appropriate.
2. The Petition is premised on the grounds on the face of it and the contents of the affidavit in support of the same, sworn by the Petitioner.
3. The brief facts underlying the Petition are that the Petitioner was charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code* in Eldoret HCCR No 3 of 1989. The petitioner was found guilty and the court ordered that he be detained at the pleasure of the president. The petitioner has been in prison since then and elected to file the present petition.
4. The petitioner set out the alleged constitutional violations in his petition. He urged that article 10(2) (b) & (c) of the *Constitution of Kenya* 2010 has been derogated by the respondents who have failed to exercise their powers with equity and non-discrimination, integrity and transparency when the 2nd respondent who is a member of the Advisory Committee on the Power of Mercy failed to take action for 34 years or make recommendations to His Excellency the President regarding the plight of the petitioner.
5. The petitioner contends that article 22(1) of the *Constitution of Kenya* 2010 has been infringed as a result of the delay in the advisory committee on the power of mercy from taking action for 34 years, which is inordinate and inexcusable.
6. The petitioner stated that article 23(1) of the *Constitution of Kenya* 2010, in protecting the fundamental rights and freedoms of the petitioner which are under threat, the court has the inherent power to hear and determine this petition for redress of denial and violation of the petitioners rights when he was and has been denied access to mental illness treatment and/or be set forth at liberty if in the opinion of a psychiatrist he is fit and will not pose any kind of danger or threat to himself and the public at large.
7. The petitioner stated that article 27(1) of the *Constitution of Kenya* 2010, has been infringed to the extent that the Petitioner having been found guilty of the offence of murder but insane was denied mental illness treatment, and if the same was accorded, then for 34 years he has remained incarcerated instead of being set forth at liberty.

8. The petitioner stated that under article 47(1) of the *Constitution of Kenya* 2010, the petitioner's rights to administrative action which should be expeditious, efficient, lawful, reasonable and fair has been infringed to the core when the advisory committee on the power of mercy failed to recommend to His Excellency the President that the petitioner was mentally fit as far back as the year 1994 and should have been set forth to liberty, soon thereafter.

9. The petitioner stated that article 50(5)(b) of the *Constitution of Kenya* 2010, the petitioner's rights to access to court records were infringed thereby denying the petitioner remedy for the various and serious breaches of his constitutional rights, namely articles 50(1) right to a fair hearing, their article 50(5)(b) right to a copy of the record of the proceedings, and article 48 right to access to justice.

10. The petitioner stated that section 166 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya contravenes article 50(2)(b) of the *Constitution of Kenya* 2010. That it is unconstitutional to the extent that it violates article 50(2)(b) of the *constitution* which requires that every accused person has the right to a fair trial which includes the right to be informed of the charge, with the sufficient detail to answer it. In light of criminal culpability and responsibility, an insane person cannot appreciate a criminal trial and all the processes and motions from the onset and to be convicted at the end on the basis of such a trial as prescribed for under section 166 above.

11. The petitioner stated that Section 166 of the *Criminal Procedure Code* contravenes article 160 of the *Constitution of Kenya* 2010. That the constitutionality of Section 166 (2) through to (7) of the *Criminal Procedure Code* is wanting since they vest the discretion on how the accused should be treated after conviction on the president which action is a fundamental duty of the judiciary. Therefore, the extent which the provisions of Section 166 take away the judicial function to determine the nature of sentence is contrary to the provisions of article 160 of the *Constitution* which provides for the independence of the judiciary. The said provisions also infringe the provisions of article 159 of the *Constitution* which vests the judiciary with judicial authority and power.

Petitioner's Case

12. The petitioner filed submissions dated September 20, 2023through the firm of Messrs Oduor Munyua & Gerald Attorneys. Learned counsel submitted that as an individual who has been found guilty but insane by the court and ordered to be detained at the president's pleasure, the petitioner should be considered as a person with disabilities. He cited the case of *Kimaru & 17 others v Attorney General & Another* (2022) KEHC 114 (KLR) in support of these submissions. It is the petitioner's case that despite his status as a person with disabilities, the state organs that have responsibility for him since conviction the 2nd respondent has kept him incarcerated without any treatment for his mental illness or suggestion that his case is under review by the advisory committee. This means that there has been a failure to address his needs as a member of a vulnerable group as required under article 21(3) of the *Constitution* and as such he has been unable to enjoy his rights as he's entitled to under article 27 of the *Constitution*.

13. Learned counsel submitted that the 2nd respondent has also breached the national values set out at article 10(2) of the *Constitution* which values are reflected in the right to fair administrative action embodied in article 47(1) and (2) of the *Constitution*. He cited the case of *Judicial Service Commission v Mbalu Mutava & Another* (2015) eKLR where the court set out the importance of article 47(1). He urged that these provisions are not optional for a fair or democratic society but are of fundamental importance to good governance and an open rights-based community. He cited the case of *Kenya Human Rights Commission & Another v Non-Governmental Organizations Coordination Board & Another* (2018) eKLR to buttress these submissions.

14. It is learned Counsel's contention that he has been assessed by Dr Eunice Temet, a consultant psychiatrist at Moi Teaching and Referral Hospital on July 31, 2023. In her report, she found that he was; well kempt in his appearance and behaviour, eurythmic in his mood, organised in his thoughts, oriented in time, place and person, organized in speech, had good judgement; in a nutshell, that he had no current mental illness. From her assessment, the petitioner urged, it is plain that he is of sound and healthy mind. Further, that since his original actions were caused by his suffering with his cerebral malaria, there can be no doubt that he now poses no danger to society. He urged the court to set him free on this basis.

15. The learned Counsel submitted that the loss of his court's record violated his constitutional rights. Counsel urged that the original court file has been lost since 1991 and efforts to trace it have proved unsuccessful. The petitioner contends that this constitutes a grave breach of the Petitioners' rights under articles 48 and 50 of the *Constitution*. As a result of these violations, the petitioner has faced hurdles no other Kenyan should face. He cited the cases of *Ali Said Abdallah v Republic* (2020) eKLR and *David Kipkorir Serem & Another v Republic* (2021) eKLR where the court expressed itself on the issue of court records. The petitioner urged the court to take a firm stance against the disappearance of court records which has taken place in this case. He has made efforts to trace his file but to no avail. In the grave circumstances, the petitioner seeks a declaration from the court that his constitutional right of access to justice under article 48 and his right to a fair hearing under article 50 have been infringed.

16. The petitioner's Counsel contention is that he has been subjected to cruel and inhuman treatment throughout his 34-year incarceration in deplorable prison conditions in contravention of articles 25(a) and 29(f) of the *Constitution*. He cited the observations from the *United Nations Committee Against Torture's Third Periodic Report on Kenya* which details the dire state of prisons in the country. He urged that the conditions in prison are particularly serious for someone such as the petitioner who deserved adequate mental health support as a result of being declared insane by the court.

17. Further, the petitioner's Counsel argued and submitted that the application of section 166(1) of the *Criminal Procedure Code* in his case breached his constitutional right to a fair trial. He urged that article 50 of the *Constitution* provides that the right to a fair trial which includes as one of the components, to be informed of the charge, with sufficient detail to answer it. Section 166(1) is incompatible with the *constitution* as it provides for the conduct of a criminal trial and potential conviction of someone who is considered insane. It is not possible for the court to be confident that such an individual is aware of and understands the charge in sufficient detail to make his defence and receive a fair trial. It is the petitioner's case that a defendant incapable of understanding or responding to their charges must not undergo a regular trial is of ancient pedigree in the common law. In buttressing the petition, learned Counsel for the petitioner invited the Court to appreciate the text, letter and spirit of articles 10, 22,24,25,27,28,29,47,48 & 50 of the *Constitution*. In the same strength of seeking constitutional remedies, learned counsel placed reliance on the following case law in addition to what is cited elsewhere in this judgement.(See the principles in *Judicial Service Commission v. Mbalu Mutava & Another* (2015)eKLR, *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* (2018)eKLR,*David Kipkorir Serem & another v Republic* (2021)eKLR, *Yeri v Republic* (2021) KEHC 182 (KLR), *Elijah Ngotho Njoroge v Republic* (2020) eKLR, Sir William Blackstone at *Book 4 of his commentaries of the Laws of England*" (1st English ed.1769)at page 24, *Rex v Pritchard* (1863)7 C&P 303, *Pate v. Robinson*, 383 U.S 375 (1966), *Wakesho v Republic*(Criminal Appeal 8 of 2016 (2021)KECA 223(KLR)(3 December 2021), *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi & another* (2007) eKLR, *Ramanoop v Attorney General* (2004) Law Reports of Commonwealth (from High Court of Trinidad and Tobago), *Isaac Ndegwa Kimaru & 17 others v The AG & DPP* (2022) eKLR, *Francis Karioko*

Muruatetu and another v Republic, SCK Petition No 15 and 16 of 2015 (2017) eKLR, *AOO & 6 others v Attorney General & another* (2017)eKLR , *Minister of Health v Treatment Action Campaign* (No 2) (2002)ZACC 15; 2002 (5)SA 721 (CC); 2002 (10)BCLR 1033 (CC), para98 (cited by the Court of Appeal in *Kimaru*,*supra*, at para 106).

18. From these literally and researched submissions touching on the various facets of the Petition, it would be of course my singular duty to delve into the finer details in conjunction with the rejoinder submissions to establish whether the petition meets the criterion of a constitutional petition.

1st Respondent's Case

19. Learned counsel for the state, Mr Mugun, filed submissions on behalf of the 1st respondent. He began by analysing the court's interpretation of section 166 *CPC* by looking at the case of *Hassan Hussein v Republic* [2016] eKLR where the Justice Kiarie Waweru found that section 166 *CPC* offended the *Constitution*. His Lordship held thus:

> A sick person's place is at the hospital and not in prison. I find section 167 of the *penal 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 2(g)(f) of the *Constitution*. article 25 provide as follows:
>
> 25. Despite any other provision in this *Constitution*, the following rights and fundamental freedoms shall not he limited
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

20. It is my opinion that keeping a sick person for an indeterminate period in a prison is cruel, inhuman and degrading treatment...

> " [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*."

21. He urged that going by the above precedents, the discussion on the constitutionality of section 166 is clearly moot.

Counsel for the state submitted that an analysis of the foregoing judicial precedents will reveal that the law has not yet been settled on what happens after the court determines that the accused is guilty but insane. For example, in the *SOM case* (*supra*), The Hon. Justice Majanja suggested that the period for review should be carried out by the court and not the president. The Hon. Justice Kiarie in the *Hassan Hussein Yusuf* (*supra*) case ruled that the best recourse would be to send the accused to an asylum for mental health assessment. In the event that of being found to be stable and not a danger to himself or society, he should be set free but detained if the assessment would be in the otherwise. On the other hand, Mativo J (as he then was) in the *AOO case* (*supra*) released the accused persons forthwith without requiring further mental health assessments. This was a similar position to the one held by Lesiit J (as she then was) in *Republic v Irungu Kamau* [2019] eKLR and *Republic v CMW* (2018) eKLR.

22. Counsel proposed that the Petitioner be subjected to a further mental assessment review in a facility other than Moi Teaching & Referral Hospital. If he is found to be mentally stable and no longer in a position to harm himself and society, then he should be released forthwith. In the event that he is

found to still be suffering from a mental infirmity and could cause harm to himself or the society, then he should be detained in a mental facility where his treatment can be monitored and a report thereof issued at intervals to be determined by the court.

23. On whether the court can order the Attorney General to amend the law, he submitted that it is trite law that it is the legislature that makes and amends laws. The mandate of the Attorney General is to defined by article 156 of the *Constitution* and is limited to advising and representing the national government in other matters that are not criminal in nature. He stated that the court cannot issue an order to the National Assembly directing how, when, which and who should conduct parliamentary business. Doing so would interfere with the doctrine of separation of powers.

Analysis & Determination

Background

In summation, learned counsel for the petitioner briefly pieced together the following extract statement, forming the basic structure of the petition,

24. Mr Bor, the Petitioner, recounts that on February 26, 1988, he had been recouping from a severe case of celebral malaria for which he had obtained treatment. As he was resting, and deep in sleep, a neighbour woke him from his slumber, and being startled, he hit the neighbour, whereby he later succumbed. He was arrested and taken to Lesos Police Station, where he indicates that he was questioned. Because of his state of mind, he could not respond to the issues being put to him adequately, and he indicates that as a result of this, he was thoroughly beaten. He further indicates that he did not record a statetement. He was taken to Eldoret Moi Teaching and Refferal Hospital for treatment of the injuries sustained during questioning and later presented in court for plea on 3rd March 1988.

    On July 7, 1989, Mr Bor was found guilty of murder but insane by Hon Justice DKS Aganya in Eldoret HCCR No 3 of 1989, after having being charged with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. It was therefore ordered that the Mr Bor he detained at the pleasure of His Excellency the President, and he has since been detained at the President's pleasure for over 34 years, during the tenure of four presidents.

    Upon his sentence, Mr Bor was imprisoned at the Nairobi Kamiti Prison. He was severely sick and was referral to Kenyatta Hospital for treatment where he indicates that he was treated for one year up to August or September 1990. Upon feeling better, he embarked, in 1991 with his father's assistance, to obtain his file at Eldoret and Nakuru Court registries to appeal, but to no avail. He served at Kamiti Prison from 1989 to 2009, at Nyeri Main Prison from 2009 to 2010, and at the Eldoret Main Prison from 2010 to date. He filed a petition at Eldoret HCCR Pet No 3 of 2019, which was withdrawn by his advocates on record, and fresh petition before this Honorable Court instituted. It is also noteworthy, that his prison term, Mr Bor has petitioned the Power of Mercy Advisory Committee for pardon but the said procedure was not successful.

25. In this matter, what is in issue is the provisions of section 166 of the *CPC* demanding interpretive clarity by the Petitioner with a view to make declarations on Constitutional violations of the Bill of Rights under article 23 of the *Constitution*. It therefore begs the question whether the petitioner's rights and fundamental freedoms have been violated by the organs of the Constitution requiring of a swift remedy to cure the continuum of infringement and/or violations entrenched in the *Constitution*. The anchor for this interpretive approach by the Kenyan people when the *Constitution* was promulgated in 2010 is traceable to article 20 which states *inter alia* that in interpreting the Bill of Rights, a Court, Tribunal or other authorities shall promote;

(a) The values that underlie an open and democratic society based on human dignity, equality, equity and freedom and

(b) the spirit, purport and objects of the Bill of Rights.

In the same lineage, is article 259 with the sub-theme construing this *Constitution* in that the *Constitution* shall be interpreted in a manner that;

(a) Promotes its purposes, values and principles

(b) Advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights

(c) Permits the development of the law and contributes to good governance.

26. I perceive such questions as raised in the petition in their nature and purposed by learned Counsel for the petitioner intensely looking at the legality, propriety, justness and the relevance of section 166 of the *CPC* when infused with the Bill of Rights provided, protected and guaranteed by the *Kenyan Constitution*. The onus of the Court is to delve into the issues to establish whether the Petitioner has discharged the burden of proof on such premised violations of the Constitution arising out of the enforcement of section 166 of the *CPC*. In the guidelines perspective on this cause of action at hand, the persuasive authority in *Ferreira v Levin NO* 1966 (1) SA 984 (CC) para 44 had this to say,

> " That the ask of determining whether the provisions of an Act are invalid because they are inconsistent with the guaranteed right hereunder discussion involves two stages, first, an inquiry as to whether there has been an infringement of the guaranteed right, if so, a further inquiry as to whether such infringement is justified under the Limitation clause which in our case is article 24 of the *Constitution*. The task of interpreting the fundamental rights rests of course, with the Courts, but it is for the applicant to prove the facts upon which they rely for the claim of infringement of the particular right in question. Concerning the second stage, it is for the legislature or the party relying on the legislation to establish the justification in terms of the limitation clause and not for the party challenging it to show that it was not justified".

27. The substance of the Petition is whether the Petitioner qualifies to rely on the Constitutional right in article 22,23,24,25,26,28,29 & 32 of the *Constitution* which provides that such rights are guaranteed by the *Constitution* and any allegations of infringement and violations must be appropriately be remedied by the Court, consistent with article 23 of the *Constitution*. Whether the remedy is one for striking down wholly the text of the provisions or part of it is a matter which must be construed within the Constitutional limit by the session Constitutional Court. As with this petition, the Court would be looking at the language of the impugned statutory provision and the context in which it is used and the letter and spirit of the provisions in the Bill of Rights. In effect then, for this petition to meet the threshold for the Court to draw from inspiration and fountain of the *Constitution*, the points of applicability as stated in the text in the case of *S v Zuma* (1995)2 SA 642 in which Kentridge A.J stated as follows;

> " While we must always be conscious of the values underlying the *Constitution*, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single objective meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the *Constitution* does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a *Constitution* is a legal instrument, the language of which must be respected. If the language used by the law-

giver is ignored in favour of a general resort to values, the result is not interpretation but divination... I would say that a *Constitution* embodying fundamental principles should as far as this language permits, be given a broad construction suitable to give to individuals the full measure of the fundamental rights and freedoms referred to in our chapter 4 of the *Constitution* 2010."(underlined emphasis mine)

28. This petition raises the pertinent issue that is the separation of powers doctrine. The scenario before this court is that the executive is granted powers that fly in the face of the doctrine as it allows the president to subsume the role of the judicial officer. Section 166 of the *Criminal Procedure Code* states;

(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.

(3) The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.

(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.

(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

29. The gist of these provisions is that the president is granted the power of mercy. In the event that a person is found to be guilty but insane, it is upon the president to order the detention of such person in a mental hospital or prison awaiting a report from the officer in charge of the institution. Upon the report being completed it is to be submitted to the president who may give orders he thinks fit. This therefore creates a scenario where the president is given a judicial officer role. However, sentencing is by and large a judicial function and therefore, section 166 of the *Criminal Procedure code* foes against this doctrine.

Article 1(3) of the *Constitution* states;

(3) Sovereign power under this *Constitution* is delegated to the following State organs, which shall perform their functions in accordance with this Constitution:-

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals

30. The doctrine of separation of powers was acknowledged by the court in *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) where the court held as follows;

> Although the *Kenyan Constitution* contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the *Constitution*, regarding the necessity of separating the governmental functions. The *Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two. We readily agree with the respondents that this must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.

31. The constitutionality of the impugned sections has been extensively litigated in our courts. The Supreme Court *In Re the Matter of the Interim Independent Electoral Commission* Advisory Opinion No 2 of 2011 expressed itself as follows on the separation of powers:

> The effect of the *constitution*'s detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.

32. In *Jayne Mati & Another v. Attorney General & another* - Nairobi Petition No 108 of 2011, the court at paragraph 31 stated as follows: -:

> .... separation of powers between the judiciary, executive and legislature is one of the hallmarks of our *Constitution*. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the *Constitution*."

33. The impugned sections were already declared unconstitutional in several decisions. 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) the court issued a declaration that the 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. Justice A.C Mrima then proceeded to declare the impugned sections unconstitutional.

34. I am in agreement with the finding of the court 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). It is evident that the impugned provisions are in breach of the doctrine of separation of powers and therefore, the same are unconstitutional.

35. Article 50 of the *Constitution* states as follows;

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this *Constitution*;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

36. The administration of criminal justice in Kenya is embodied under article 50 of the *Constitution* on fair trial rights which are not derogable in any circumstances. To this extent, the law guarantees rights of an accused person at various levels of the criminal process. One of the touchstone is the principle of the presumption of innocence until proven guilty. The *Constitution of Kenya* has fairly balanced the rule of law and the crime control models as detailed in article 10 on national values and principles of governance, article 27 of equality and freedom from discrimination, article 48 on access to justice, article 49 on rights of arrested persons and article 50 on rights to a fair trial. This same *Constitution* implicitly provides that rights and fundamental freedoms emanating from the nature of mankind are inviolable and inalienable unless they fit within the spectrum of the limitation clause. It is also a statement of the due process of law in article 29 which provides that no one shall be deprived of his/her liberty except on such grounds and in accordance with such procedure as established by law. What do I see as the key element on the presumption of innocence until the contrary is proved by the Prosecution? It is confined to the Mens Rea, being guilty on the part of the perpetrator, which pre-supposes the presence of mental faculties which enable the suspect or accused to have willed his/her crime. The other crucial criteria is what is defined as Actus Reus elements. This is constituted by an act or deed or commission or omission or in some cases the occurrence of and event in which the offender is involved and it may include surrounding circumstances, consequences and results of the acts or omission (see the guidelines in *Emma d/o Mwaluko v Republic* (1976) LRT 197.For example in the case of murder, the codification of the criminal law in section 203 as read with section 206 of the *Penal Code* has this intention based element (a) intention to kill or intention to cause grievous injury and being aware with foreseeable knowledge, that a particular result of his/her conduct will succeed in his/her purpose of occasioning death of another human being. The point I am trying to emphasize is that intention of a suspect or an accused person indicted by the Director of Public Prosecution of the offence under article 157 (6) & (7) of the *Constitution* covers the case of a person who knows that the achievement of his purpose to commit the crime would necessarily cause the expected result in question in the absence of some supervening event. In our Penal system, towards advancement of the criminal justice administration, a person is not generally liable to be found guilty on convicted of either

non-serious or serious crime where the prohibited result was not only un-intended but also unforeseen. Mens Rea therefore is at the core of both procedural and substantive justice.

37. The evidence of the prosecution should be examined against the evidence offered by the accused in addition to any available defences known in law i.e for purposes of this petition, the defence of insanity. A distinction ought to be drawn in a trial of an accused person under article 50(1) of the *Constitution* between the factual guilt, that is what the accused did as a matter of fact, with the requisite mens rea, and the legal guilt being what the prosecution was able to establish beyond a reasonable doubt and in conformity with due process that the accused performed the criminal act. These are the difficulties which if anything, the presumption of innocence rests as a constitutional imperative. The reality practically of course is that once the suspect of a criminal offence is arraigned before a Court of law, the mind-set of many players from the National Police Service, the investigating agencies, the EACC and even the judicial officers in the criminal justice system, is that the suspect is probably guilty. The attitude reminds one of the very urgency in which the business of plea taking in non-serious offences is undertaken with the dangers inherent of a threat to infringement of the provisions of article 50 of the Constitution on fair trial rights. It is inevitable that many of the suspects in the criminal justice system are ignorant of the criminal law defences to an offence, for example self-defence in section 17, provocation in section 207 & 208, excusable or justified homicide as contemplated in article 26(3) of the *Constitution* and other enabling statutes. In other words, a common allegorical personification depicts justice as a woman who is holding a set of balance scales, comprising a balanced beam and two pans. The evidence of the prosecution is to be weighed on the pan of the scales, with evidence for the accused being weighed on the other.

38. In this due process, some of the challenges that may arise is whether that accused person in the dock, a preliminary inquiry has been carried out by the trial court, as to his/her fitness to stand trial. Every person adjudged before the criminal court in Kenya is presumed not to suffer from a mental illness or mental defect unless the contrary is proved by way of a psychiatrist medical report, yet the person may lack the capacity to appreciate the wrongfulness of his/her actions or act in accordance with an appreciation of his/her personal circumstances of the wrongfulness of his/her acts of omission or commission. From the executive summary extract by the petitioner, the alleged criminal proceedings were conducted in reference to the commission of an act or an omission which constituted an offence of murder in issue. There is every evidence adduced before court that the petitioner had such a reason for reason of mental defect, or illness not to be so responsible for the offence in question. In the findings contained in the judgment of the trial court, the petitioner was found guilty of murder but declared insane. The next course of action was to have him detained at the President's pleasure with a few interludes of being seen at Kenyatta National Hospital for treatment, Eldoret Moi Teaching & Referral Hospital, and also pursuing access to justice by way of a right of appeal. Then the unthinkable happened, the manual record of the case file went missing, rendering any application/petition before court untenable. Defining mental health is not a simple matter, either by the prosecutors or the police, lawyers or even judges. How to determine the manifestation one's psychiatric condition, disease or disability is one which transcends a one off medical examination. It is conceivable from the record that the petitioner suffered from a serious psychiatric disorder triggered by cerebral malaria. Mental illness is a medical condition and it is important that measured evidence be adduced by the expert testimony to assist the trial court to consider the psycho-legal implications. This condition suffered by the petitioner has its validity relating to the blame worthiness of the petitioner's conduct to justify any imposition of a detention order by the State. The presumption of innocence in article 50(2)(a) of the *Constitution* would be infringed whenever there is a possibility of a conviction despite the existence of a reasonable doubt and that of the same characteristics of a person presumed to suffer from a mental illness or defect to render him not criminally liable for the offence. If taken within the context of article

25(a), the fundamental rights and freedoms from torture and cruel, inhuman or degrading treatment or punishment which may not be limited in our constitutional dispensation was weighed in against the State by having him detained at the pleasure of the President. The Pre-rogative of Mercy under article 133 of the *Constitution* for the last 34 years, seems not to have reviewed his case with a neutral and open-minded approach about the petitioner's innocence for reason of mental infirmity. Primarily, the petitioner presumably was detained without parole unlike other prisoners whose sentences are reviewed from time to time to receive pardon from His Excellency the President. This Court strongly believes that the executive has extensive discretion to define crimes and defences that may be brought to its attention and to allocate the burden of persuasion appropriately to affect the degree of culpability. So, what was the petitioner doing in our correctional facilities given the profound statement by the session Judge on 7th July 1989 that he was found guilty but insane? Sir William Blackstone at Book 4 of his "*Commentaries of the Laws in England*" (1st English ed.1769) at pages 24-25 notes that"

> " if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If after he be tried and found guilty, he loses his sentence before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed; for peradventure, says for humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." (see also *Pate v Robinson*, 383 US 375 (1966).

In the same vein, the court in *R v Presser* (1958) VR 45 in which the Supreme Court of Victoria, the Judge observed that for the case like the instant petition,

> " He needs I think to be able to understand what is it that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge".

Again the crucial issue in this petition which is very clear from the judgment of the trial court, it was determined that the petitioner's actual mental state as it was then during the commission of the offence, was a mental state which was disabled and unlikely to know, appreciate or understand the nature of his conduct, or that it was morally or legally wrong to commit the offence of murder. Whether the petitioner was so lacking in volition due to a mental defect or illness is a fact which was in issue and proven by the medical evidence that he could not have controlled his action perfectly led to the conclusion made by the trial Judge.

39. The impugned section 166 of the *CPC* which has been litigated for some now provides for the defence of lunacy adduced at the trial of an accused person. The preamble of Section 1 states:

> " When an act or omission is charged against a person as an offence and is given in offence on trial of that person for that offence that is insane so as not to be responsible for his act then if it appears to the court before which before the person is tried that he did the act or made the omission charged but was in same at the time he did or made it, the court shall make a

special finding to the effect that the accused is 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.

(3) The president may order the person to be detained in a mental hospital, prison or other suitable place or safe custody.

(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the president under sub section 3 shall make a report in writing to the minister for the consideration of the president in respect of the condition, history and circumstance of the person so detained, at the expiration of a period of 3 years from the date of the president's order and thereafter at the expiration of each period of 2 years from the date of the last report.

(5) On consideration of the report, the president may order that the person so detained may be discharged or otherwise dealt with, subject to such condition as to his remaining under supervision in any place or by any person and so such other condition for ensuring the safety and welfare of the person in respect on whom the order is made and of the public as the president thinks fit."

A principle of statutory interpretation, is that the words must be construed and interpreted in their ordinary meaning unless in doing so, there will be an absurdity or inconsistency with the statutory scheme. So this provisions in interpreting them must be effectively be read in rather than reading down. In the same statute, the phrase shall obligates the constitutional agencies like the executive branch to undertake certain decisions specified as a result of the finding made by the medical report. What the section does is to import compulsory incarceration or institutionalization of the accused person apparently for his own safety and the public at large. What is the implication of the power being exercised under Section 166 of the *CPC* by the president of the Republic of Kenya? In the manner it is executed it threatens or infringes the provisions of article 29 of the *Constitution* which provides that every person has the right to freedom and security of the person which includes not to be deprived of freedom arbitrarily or without just cause, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. The court order of detaining the petitioner in the actual sense deprived him of his right to freedom and security. During the period under review for 34 years, the petitioner has not been serving any sentence known in law in view of the findings by the judge that he was mentally insane to appreciate the initial charge of murder preferred against him. In the case of *Bernstein and Others v Bester and Others NNO* (1996) ZACC 2, SA 751 (CC) 1996 (4). The court in referring to the provisions to the right to freedom and security of the person in equal strength with our Section 29 of the *Constitution* observed thus:

"freedom has two interrelated constitutional aspects, the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in *Constitution*. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional because the grounds upon which freedom has been curtailed are unacceptable there are two different aspects of freedom. The first is concerned particularly with the reason for which the

> state may deprive someone of freedom. As I stated in (Bernstein) Our *constitution* recognises that both aspect are important in a democracy. The state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reasons for which the state wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person or liberty is fair."

The legislative measure under section 166 of the *CPC* leaves no doubt that the conception of human dignity as an intrinsic value on account of the detention by the executive order of the precedency in compliance to the scheme detailed in the impugned provisions manifested infringement and violations guaranteed in article 28 of the *constitution*. The right to be treated with dignity was lost. Something that is foundational to basic human rights in general. There can be no argument in my opinion that the state takes upon itself to order the detention of the petitioner while fully aware that he suffered from a disability of the mind at the time he went through the criminal proceedings before Aganyanya J. as he then was. This court has not been told that the removal of a person suffering with mental illness like the petitioner there was compelling evidence that he was a threat to himself or the community for the 34 years he has been incommunicado. The Supreme Court of Canada in *Egan v Canada* (1995) 29 CR had this to say on this issue:

> " This court has recognised that inherent human dignity is at the heart of individual rights in a free and democratic society. Equality as that concept is enshrined as a fundamental human right means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being. Regardless of individual differences, equally means that our society cannot tolerate legislative distinction that treat certain people as second-class citizens. That demeans them and treats them as less capable for no good reason or that otherwise offends fundamental human dignity."

40. In light of this decision there are moot questions which remain unsettled when going through the procedural components of Section 166 of the *CPC*. Was the deprivation of the physical freedoms and liberties of the petitioner justifiable. Are the reason for the deprivation of his dignity and right to freedom procedurally fair and acceptable. Generally speaking, the constitution on most cases demands of the impartial entity may it the executive or the legislature to act within the bounds of article 10 of the *constitution* on National values and Principle of Governance. The symbolic function of the head of state helps this court to understand and explain an apparent anomaly with Section 166 in so far as the right to be detained at the president's pleasure is concerned. There is every reason to state that the code in which provisions under Section 166 are anchored ought to be revisited by the legislature with an endeavour to have them comply with the constitution. This discussion will be incomplete without a mention of article 27 on equality and freedom from discrimination. The structure of the petition before me, calls for an inquiry to answer the question as to whether Section 166 of the *CPC* is in violation of the equality clause. Does the provision differentiate between the people or categories of people, if so does differentiation bear rational connection in a legitimate government purpose? If it does not, then there is a violation of article 27 of the *constitution*. On the other hand, even if it does bear a rational connection it might nevertheless amount to discrimination. What is the key characteristics which this court must look into on the issues raised in the petition? First and foremost is whether the differentiation amounts to discrimination if it is on a specified ground in article 27(4) of the *constitution*. That is whether or not there is discrimination will depend on whether objectively, the amount is based on attributes and characteristics, which have the potential to impair a fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

This entails a dimensional approach that unfair discrimination that has been characterised in the impugned provision is unfair because the petitioner fundamental rights and freedoms have been limited for reasons of his insanity. In my view, the considerations in the Act as much as the country has largely been implementing the provisions under Section 166 of the *C.P.C* the owners and purpose of it is inevitably unconstitutional. The only purpose of rationality is to have the petitioner detained in terms of his own security and that of society on a highly debatable and contra version matter of policy on the right to presumption of innocence and the blameworthy state of mind with which the petitioner might have attributed to commit the offence which the trial court conclusively stated that he was not criminally liable for reason of mental state with intersect with legal notions of insanity.

41. The question that arises is whether an insane person is capable of undergoing a fair trial under the provisions of article 50. Before trial, an accused person is required to go for a mental assessment test to determine if he is fit to stand trial. A finding of guilty but insane is ironic as the fact that he is insane would mean that he does not have the capacity to understand the charge sufficiently in order to answer to it. It follows that putting such a person through a hearing is a breach of his constitutional rights. In *Wakesho v Republic*, the Court of Appeal expressed itself as follows;

> "We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the *Criminal Procedure Code* in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.
>
> Second, the subs-stratum of the provisions as regards the right to fair trial in criminal cases in article 50(2) of the *Constitution* is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the *Criminal Procedure Act*, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the court send a copy of this judgment for the attention of the Attorney General. Enough said on that."

42. It is evident that the court was of the opinion that the provisions of section 166 of the *CPC* were unfair. Indeed, In a particular sense Section 166 is the direct reverse of the provisions founded in article 22,24,25,26(1) 27, 28, 29, 48, & 50 of the *constitution*. In my view, even article 133 of the *constitution* on the power of mercy contains provisions which ae constitutionally responsive on the Bill of Rights but which were never taken advantage of in the formulation of insanity as established by the trial court that the petitioner though prosecuted, found guilty and convicted him for the offence of murder he suffered from mental illness at the time of the commission of the offence to form the necessary mens-rea to commit the crime.

43. It follows therefore, that appropriate reliefs sought in the petition are meritorious to be granted by this court under article 23 of the *constitution* in favour of the petitioner couched in the following language:

i. A declaration that the provisions of section 166 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya are contrary to the provisions of article 22,24,25,26(1) 27, 28, 29, 48, 50(2)(b) & 160 of the *Constitution of Kenya* 2010, and are therefore null and void.

ii. That a review of the conviction of guilty but insane be made and the said conviction be replaced with a finding of not guilty for reason of insanity.

iii. An order directing the 2nd respondent to initiate the process of amending section 166 of the *criminal procedure code* cap. 75 of the Laws of Kenya.

iv. That the petitioner in this case in view of Section 166 of the *criminal procedure code* as read with article. 133 of the *Constitution* does not seem to have a really possibility of release by an exercise of prerogative of mercy and therefore sufficient cause to have disproportionate detention reviewed and set aside.

v. That an order be and is hereby made that the officer commanding prisons Eldoret currently hosting the petitioner do have him escorted to Moi Teaching and Referral Hospital for a current psychiatric report. This will inform the court on the possibility of the petitioner's right to access health rights to be guaranteed by the state.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024

R. NYAKUNDI

JUDGE