



**Mwangi v Director of Public Prosecutions (Miscellaneous Criminal Application E020 of 2022) [2024] KEHC 8613 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8613 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2022**

**DKN MAGARE, J**

**JULY 10, 2024**

**BETWEEN**

**CAESAR THIARI MWANGI ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. This is a ruling in respect of the Notice of Motion Application dated 18/8/2022.
2. The Application is expressed to be brought under the provisions of Articles 27, 29, 50, 54 and 160 of the Constitution and Section 162 to 167 of the *Criminal Procedure Code*, (Cap 75) Laws of Kenya.
3. The applicant is seeking for orders as follows:
  - a) That, the detention of the Applicant under Section 162-167 breached his constitutional right to fair trial.
  - b) That, the detention of the Applicant under Section 162-167 breached his constitutional right against inhuman and degrading treatment.
  - c) That, the detention of the Applicant under Section 162-167 breached his constitutional right as a person living with mental disability.
  - d) That, the detention of the Applicant under Section 162-167 breached his constitutional right against discrimination.
4. The Application is premised on the grounds on its face and is supported by the affidavit of the even date, sworn by the applicant. He avers that he was charged with murder contrary to Section 203 as read together with section 204 of the Penal Code, (Cap 63), Laws of Kenya *vide* High Court Criminal Case No. 17 of 2014.



5. That, at the conclusion of the case, and by a judgment delivered on 23/11/2018 March 201 he was found guilty but insane. Further, pursuant to the provisions of Section 166(2) of *CPC*, he was sentenced to be detained at the President's pleasure.
6. As such, he prays that, the court should set aside the orders of his detention at the President's pleasure and re-sentence him, in line with the principles and guidelines as set out in the Supreme Court of Kenya's decision in the case of; *Isaac Ndegwa Kimaru & 17 Others v the Attorney General & Others* [2022].
7. The Application is essentially not opposed. The Respondent filed submissions on 18<sup>th</sup> March 2024 in which it is stated that the submissions are in response to the Application and the submissions of the Applicant. That is proper as submissions cannot take the position of pleadings. The Respondent ought to have filed Replying Affidavit, Preliminary Objection or Grounds of Objection in response to the Application. However, I will sparingly deal with the submissions of the Respondent in so far as the same raises points of law.
8. The application was canvassed vide the filing of submissions, wherein, the applicant filed submissions dated 21/11/2023 and argued that, the detention of a convict at the President's pleasure, violates the his rights under Articles 27, 29, 50, 54 and 160 of the *Constitution* of Kenya, 2010 as follows:
  - a) That, the detention of the Applicant under Section 162-167 breached his constitutional right to fair trial.
  - b) That, the detention of the Applicant under Section 162-167 breached his constitutional right against inhume and degrading treatment
  - c) That, the detention of the Applicant under Section 162-167 breached his constitutional right as a person living with mental disability
  - d) That, the detention of the Applicant under Section 162-167 breached his constitutional right against discrimination.
9. The applicant relied on various cases. I have perused them and note the courts have held that Section 166(1) of the Code that directs a convict suffering from mental disability to be detained at the pleasure of the President for an indefinite period of time is against the *Constitution* of Kenya, 2010. That, it erodes human dignity, is cruel, discriminates, is inhuman and amounts to degrading treatment. Further, the indefinite period of sentence is harsh and excessive. The cases relied on, only include but are not limited to: -
  - a) *Isaac Ndegwa Kimaru & 17 Others v the Attorney General & Others* [2022].
  - b) *AOO & 6 Others v A.G & Another*, (2017) eKLR
  - c) *Republic v Ibrahim Kamau Irungu* (2019) eKLR
10. That in the instant case, the applicant has been in custody for since 23/11/2018 and therefore his sentence should be commuted to the period served.
11. The Respondent, in response, filed submissions dated 6/3/2024 and submitted that on a point of law, indeed Section 166 of the *CPC* was unconstitutional and ought not to be applied to this case. They cited:-
  - a) *Isaac Ndegwa Kimaru & 17 Others v the Attorney General & Others* [2022].
  - b) *AOO & 6 Others v A.G & Another*, (2017) eKLR



- c) *Republic v SOM (2018) eKLR. R v Edwin Njibia Waweru (2019) eKLR*
12. They urged that the Applicant be committed to a hospital or medical facility as opposed to being set free.
13. Furthermore, that the Court ought to consider the rights of the victim whose right to life under Article 25 was cut short.

### **Analysis**

14. The issue that presents to me for determination is whether this court can revise the Orders granted in High Court Criminal Case No. 17 of 2014 detaining the Applicant at the pleasure of the President's power of mercy; in line with the Judgement of Court in *Isaac Ndegwa Kimaru & 17 Others v the Attorney General & Others* [2022].
15. I note that the Applicant has not asked this court to set aside the Judgement of the court. He has also not asked the court to set him free. What he has asked the court to do is to revise the Judgement in line with the subsequent High Court Decision in *Isaac Ndegwa Kimaru & 17 Others v the Attorney General & Others* [2022].
16. I note that in the said case, the court granted the following reliefs:
- a. A declaration hereby issues 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 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.
  - d. A declaration hereby issues that no court of law shall henceforth commit any person facing a criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President's pleasure pursuant to any law.
  - e. A declaration hereby issues that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President's pleasure. For clarity, a prison facility shall only accept such persons with mental challenges committed to the facility under the orders of the court which orders shall not include any order to hold such persons under the President's pleasure.



- f. A declaration hereby issues that any continued detention 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’ and that they be detained at the President’
  - g. A declaration hereby issues that the Advisory Committee on the Power of Mercy established under article 133 of the Constitution has no jurisdiction to deal with persons with mental challenges who are facing criminal trials or who have been tried and special findings made that they were ‘guilty but insane’ until such a time when such persons are sentenced by Courts of Law.
  - h. An order hereby issues that any prison facility in Kenya holding 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’ and be detained at the President’s pleasure shall forthwith make arrangements and arraign such a person before the court that committed the person to the prison facility.
  - 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.
  - j. In the event the prison facility is unable to arraign such a person before court as ordered in order (h) above, the facility shall immediately so inform the court and the court shall make appropriate orders and directions as it deems fit.
  - k. The Honourable Deputy Registrar of the Constitutional and Human Rights Division of the High Court shall, in the next 14 days, transmit copies of this judgment to the parties in this matter as well as to the Commissioner-General of the Kenya Prisons Service, the Speaker of the National Assembly, the Registrar of the High Court and the Registrar of the subordinate courts. The Speaker of the National Assembly shall take steps towards ensuring that the impugned sections of the Criminal Procedure Code, cap 75 of the Laws of Kenya are aligned with the Constitution and in terms of this judgment.
  - l. The Speaker of the National Assembly shall file an affidavit in this court on the status of implementation of this judgment in the next 12 months.
  - m. The Honourable Deputy Registrar shall, at the expiry of 12 months from the delivery of this judgment, fix this matter before court for appropriate directions.
  - n. There shall be no orders as to costs.
17. In my considered opinion, the importance of getting proper treatment for mental health disorders cannot be overemphasized. Everyone dealing with mental illness deserves adequate care. The Applicant has been detained at the Kamiti Maximum Prison for 4 years now. It is conceivable that the presidential power of mercy is no longer a law and justice parameter for persons who are declared guilty but insane. Therefore, if the Applicant is to continue being detained in prison, he will remain like a murder convict when in fact he is ‘guilty but insane.’ This is essentially the same thing as being ‘not guilty by reason of insanity.’
18. I therefore, hold the view that the Applicant is erroneously held in a correctional facility or detention in prison at the Kamiti Maximum Prison. Like conceded by the Respondent, in light with the change in the legal regime, the Applicant needs to get treatment in a mental health facility or hospital. This



is so that he can receive care instead of confinement. He is now a person living with mental disability protected under Article 54 of the Constitution.

19. I am consequently inclined to allow the Application and make appropriate orders to facilitate smooth transition to freedom.
20. In the upshot I make the following Orders:
- a. This Application dated 18/8/2022 is hereby determined in terms of the Judgment in High Court at Nairobi Constitutional Petition No 226 of 2020, *Isaac Ndegwa Kimaru & 17 Others v The AG & DPP* (2022) eKLR.
  - b. Judgment in High Court at Nairobi Constitutional Petition No 226 of 2020, *Isaac Ndegwa Kimaru & 17 Others v The AG & DPP* (2022) eKLR shall forthwith be implemented in respect of the Applicant herein.
  - c. Given that the Applicant was under disability, it will not be proper to continue detaining him under the presidential pleasure. The pleasure and detention are terminated. And in lieu thereof, I give the following directions: -
    - i. The Applicant be detained at Nyeri GK Prisons pending assessment whether he has recovered.
    - ii. Further probation and after care services to trace the family and thereafter prepare a probation report to facilitate re-integration into the society.
    - iii. If the applicant has recovered, he be released to his family and the probation officers to facilitate re-integration.
    - iv. If he has not recovered, the Applicant be released to an appropriate mental institution for treatment.
    - v. The matter to be mentioned in court in the new term to confirm the report and an undertaking from family members to take the Applicant for treatment.
    - vi. Upon recovery, and on the date of release by this court, the Applicant shall be in a 5 year probation and re-integration program.
    - vii) Directions on 23/9/2024.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10<sup>TH</sup> DAY OF JULY, 2024.**

Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Ms. Kaniu for the State

Applicant in person

Court Assistant – Jedidah

