



**Momanyi v Republic (Criminal Miscellaneous Application E141 of 2022)  
[2023] KEHC 550 (KLR) (Crim) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E141 OF 2022  
DO OGEMBO, J  
FEBRUARY 7, 2023**

**BETWEEN**

**ISAAC MAKWORO MOMANYI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant Isaac Makworo Momanyi, has moved this court by way of a Notice of Motion application dated 23.5.2022, The application is brought under sections 216 and 329 of the Criminal Procedure Code. The application has 2 substantive prayers,
  1. That the Honourable court be pleased to revise its own earlier posited orders in High Court criminal case No. 57 of 2013 at Nairobi in line with orders and directives dated 1.2.2022 in High Court Petition No. 226 of 2020. Isaac Ndegwa Kimaru and 17 others.
  2. That the Honourable court be pleased to call for medical records and other antecedents of the applicant herein in order to duly inform itself on the appropriate orders and reliefs to meet out in the present application.
2. The application is grounded on the following grounds;
  - a) That the continual detainment of the applicant herein under sections 162-167 of the Criminal Procedure Code has since been declared unconstitutional as it violates 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*.



- b) That sentencing is a crucial element of any trial process, is a Judicial function which can only be exercised by a court of law and not any other arm of government in order to protect and safeguard the inherent principle of separation of powers.
  - c) That sections 216 and 329 of the Criminal Procedure Code allows this court the discretion if it wishes to before passing sentence, to receive such evidence such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
  - d) That judiciary sentencing, guidelines which have been in use since 2015 enjoins this court to apply set out principles underpinning the sentencing process in order to achieve amongst other values, respect for human rights and fundamental freedoms.
3. The application of the applicant is supported by the applicant's affidavit sworn on 23.5.2022 in which he depones that upon being convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the court on 9.3.2018, made a special finding that he be detained to serve at the pleasure of the president. That he has since then been medically reviewed several times (the last one being in June 2019) and found to be fit and healthy and is pursuing a Bachelor of Laws degree of the University of London. He relied on the decision of the Hon. Justice Mrima in Petition no. 226 of 2020, that persons who are detained in prison facilities in Kenya under the president's pleasure ought to be arraigned before the courts which committed them and the courts must take charge of those persons and make appropriate orders and directions, taking into account the mental status of the accused and the period the accused has been detained in prison at the president's pleasure.
  4. Further to the averments in the affidavit in support of the application, the applicant has further filed written submissions herein (filed on 15.11.2022) in which the he has raised several factors of mitigation. That the incident happened when he was of youthful age and unmarried. That though actus reus was proved against him, the element of mens rea was not as he was not mentally competent. That he is deeply remorseful and apologized to society and family of the deceased. That he is now of sound mind and furthering his education as seen above. That he is ready to better his life and has been engaged in mentoring fellow prisoners. He listed various courses and certificate he has since obtained.
  5. He urged the court to apply the sentencing policy guidelines with focus towards rehabilitation rather than punishment. He urged for proportionate punishment. He cited the case of Fatuma Hassan Salo v Republic [2006](Citation incomplete), in which the Hon. Makhandia J. held,
 

“sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors.”
  6. The applicant, has in the circumstances sought for the following prayers:
    - i. That the court finds that the period already served in custody i.e from 2013 is sufficient punishment under section 333(2) of the Criminal Procedure Code.
    - ii. That in the alternative, the court gives a reasonable definite sentence.
  7. Ms. Joy for the Respondent made an oral response to this application that the court refers this matter to the Presidential committee to deal.
  8. I have considered the submission made by both sides on this application. As I understand it, this application has been brought up pursuant to the decision of the court in petition no. 226 of 2020, Isaac Ndegwa Kimaru and 17 others by the Hon. Justice A.C. Mrima, particularly the holding that persons



who are detained in prison facilities in Kenya under the presidents pleasure ought to be arraigned before the courts who committed them and the courts must take charge of those persons and appropriate orders and directions. Of course those are orders of court of concurrent jurisdiction and this court cannot abrogate itself the jurisdiction to determine the veracity or otherwise of those orders. The orders, by their nature therefore are not binding on this court.

9. The circumstances of our case otherwise unique. Here is a party who had been found guilty of the offence charged and ordered to be detained at the pleasure of the president pursuant to the section 166 of the criminal procedure code. The party has now brought himself before the court to confirm that he is now healthy and mentally stable and that he may now be considered for alternative sentence. The applicant has attached medical examination reports that all agree that he is currently of stable mental status, a fact confirmed by the medical report of Dr. Ochieng J. dated 23.8.2022 which report was presented upon the court ordering for the same. This court therefore, has absolutely no doubt that the applicant is indeed now of stable mental capacity.
10. Section 166 of the Criminal Procedure Code under which the applicant was ordered detained at the pleasure of the president states:

“ 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 acts was done or 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.”
11. My reading and understanding of the above is that for the court to make the special finding, it must first be convinced of the guilt of the accused person. The court then orders for the detention of the accused/convict at the pleasure of the president only because of the mental status of the accused convict. Otherwise, the court would proceed to sentence the accused in the normal way. This is exactly the situation that prevailed before the trial court as at the time that it made the special finding.
12. The applicant is now in a stable mental status. He has presented himself before the court to be sentenced. In his current state, this court is convinced that it is proper and just that the court takes back the applicant for sentencing in the normal way. It would be preposterous to continue having the applicant, a mentally stable person, detained at the prison for an indeterminate period at the pleasure of the president. The ends of justice would only be served if the applicant is sentenced by the court for a determinable period. And this is what he has prayed for at prayer 2 of his submissions.
13. In sentencing the applicant, I have considered the mitigating factors that he has now raised. That he is a first offender. That the incident took place when he was a youth who was unmarried. That he is remorseful and asks for forgiveness from the family of the deceased and the community at large. That he has reformed and is a mentor to other prisoners. That he is now a student pursuing his Bachelor of Law Degree from the University of London amongst other factors.
14. The court has at the same time considered the general circumstances of this case. A young life was lost in a cruel and painful manner. It was totally unprovoked. In the process, a family lost their husband, father and breadwinner.



15. The sentencing policy guidelines gives on the objectives of sentencing to be the following;

- i. Retribution to punish the offender for his or her criminal conduct in a just manner.
- ii. Deterrence, to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- iii. Rehabilitation, to enable the offender reform and become a law abiding person.
- iv. Restorative justice, to address the needs arising from the criminal conduct, including loss and damages.
- v. Community protection, to protect the community by incapacitating the offender.
- vi. Denunciation, to communicate the community's condemnation of the criminal conduct.

16. I have considered the circumstances of this case wholesome. I am convinced that the applicant deserves a custodial sentence that would act as a deterrent to him while at the same time avail to him full rehabilitation. I accordingly sentence the applicant to serve 20 years imprisonment. This sentence shall run from 4.6.2013, the date when he was first arraigned court and remanded. This is pursuant to section 333(2) of the criminal procedure code. It is so ordered.

**D. O. OGEMBO**

**JUDGE**

**7.2.2023**

**Court:**

**RULING READ OUT IN OPEN COURT (ON-LINE) IN THE PRESENCE OF THE APPLICANT (KAMITI), MS. ADHIAMBO FOR THE STATE.**

**D. O. OGEMBO**

**JUDGE**

**7.2.2023**

