



**GNM v Attorney General & another (Petition E007 of 2022)
[2023] KEHC 2565 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
PETITION E007 OF 2022
LM NJUGUNA, J
MARCH 23, 2023**

BETWEEN

GNM APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

OFFICE OF THE DIRECTOR PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

1. The applicant herein filed an application dated April 25, 2022 and wherein he has sought for orders as enumerated on the face of the application.
2. The application is premised on the grounds on its face and it's supported by the affidavit of the applicant. The applicant's case is hinged on the judgment in Petition No 226 of 2020 in which the court declared Sections 162(4) and (5), 166(2),(3),(4),(5),(6) and (7) and Sections 167(1)(a),(b),(2),(3)and(4) of the *Criminal Procedure Code* unconstitutional. The applicant was convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and thereafter a special finding of guilty but insane was entered. The applicant contended that she has been in custody for over ten years and during which time she received treatment and has since recovered. She argued that any detention of persons with mental challenge who are facing criminal charges or have been tried and a special finding of guilty but insane entered without meting out a determinate sentence is unconstitutional. This court was therefore urged to mete out a determinate sentence and /or any other direction it deemed fit under the circumstances herein.
3. The 2nd respondent via an undated replying affidavit stated that this court properly entered a special finding of guilty but insane against the applicant. That the judgment of the Honourable court declaring sections 162(4) and (5), 166(2), (3),(4),(5),(6) and (7) and sections 167(1) (a),(b),(2),(3) and 4 of the *CPC* in Petition No 226 of 2020 unconstitutional is not binding on this Honourable court. It



was deposed that this Honourable court has the authority to consider the matter before it and reach a just decision based on the facts before it. That article 133 of the Constitution recognizes the president's power of mercy under section 166 of the CPC and as a result, the provision is not unconstitutional. It was argued that the provision only gives the president authority to grant mercy and not to impose a sentence; therefore, the president is acting in an executive capacity rather than a judicial one. However, the prosecution conceded to the petition only to the extent of the indeterminate nature of the sentence imposed under section 166 of the CPC; this court was therefore urged to pass a determinate sentence for the reason that it is clothed with jurisdiction.

4. Directions were taken that the petition be canvassed by way of written submissions and the petitioner and the 2nd respondent adhered to the directions.
5. The petitioner in her submissions urged this court to review the sentence meted out on her in reference to the orders in Petition No 226 of 2020. That having been convicted of the offence of murder, a special finding was made where she was found guilty but insane. She stated that she has spent ten years in prison and therefore urged this court to release her as she is now sane.
6. The 2nd respondent submitted that there are several case laws that have found the section to be unconstitutional on the ground that indeterminate sentences under those sections are cruel and inhuman. That the decisions have found that section 166 contravenes articles 25(a), 27(1), (2), (4), 28, 29 (d), 50,51(1) (2), 159 and 160(1) of the Constitution hence the same is unconstitutional. That however, the court in the Republic Vs ENW [2019] eKLR adopted a different approach. It was submitted that despite the fact that this court is not bound by the said finding, it was urged that this court be pleased to be persuaded by the finding of Hon Lessit which held that section 166 of the CPC only grants the president the power of mercy which is an executive power recognized by article 133 of the Constitution. It was contended that the expedient and judicious way to deal with the cases under section 166(1) of the CPC was to pass a determinate sentence, only then can the executive carry out its responsibility under section 166(2) (7) of the CPC. Reliance in supporting this proposition was placed on the case of Stephen Mwangi Maina Vs Republic [2020] eKLR. In the end, it was submitted that the applicant's rights are violated by the indeterminate nature of the sentence imposed under section 166 of the CPC. Therefore, this court was urged to exercise its unfettered discretion under article 165 of the Constitution to issue the applicant a determinate sentence in order to ensure fair administration of justice.
7. The 1st respondent did not participate in the proceedings herein despite being served.
8. I have considered the application herein, the replying affidavit by the 2nd respondent and the written submissions made by the parties. This court has been called upon to determine the constitutionality of an indeterminate sentence in respect to the application herein.
9. The Court of Appeal in Wakesho Vs Republic (Criminal Appeal) [2021] KECA 223 KLR in its attempt to deal with the constitutionality of an indeterminate sentence in respect to special finding of guilty but insane made reference to several High Court decisions on the matter. The Court referred to the case of Hassan Hussein Yusuf Vs Republic [2016] eKLR where the High Court at Meru (Kiarie Waweru Kiarie, J) found section 167(1) of the Criminal Procedure Code requiring an accused person to be detained during the President's pleasure to be unconstitutional for being discriminative to people with mental illness. The court instead directed that the appellant be accorded mental treatment and thereafter be set at liberty unless in the opinion of a psychiatrist the appellant would pose any danger to the public and to himself.
10. In the same breadth, in Republic Vs SOM [2017] eKLR, the High Court at Kisumu, Majanja, J expressed "doubt as to the constitutionality" of section 166(2) of the Criminal Procedure Code which



requires the court, on making a special finding, to report the case for the order of the President and to order the accused to be kept in custody. He instead proceeded to apply the provisions of section 7(1) of the Sixth Schedule to the Constitution, in order to align the provisions of section 166 of the CPC to the Constitution. Further, he proceeded to align the section to the Constitution by holding that the reference to President shall be read to mean, the Court. He continued to state that it would be imperative for the accused to be brought before court periodically in order for the court to give directions based on the facts of the circumstances as they play and further, the evidence of an expert and other evidence.

11. In Republic Vs ENW [2019] eKLR, Lesiit, J (as she then was), distinguished, for purposes of section 166, the judicial function to pass sentence as a reserve of the judicial process, and the executive responsibility of the President regarding power of mercy.

12. The learned judge had this to say:

“20. It is clear that passing sentence is an integral part of the judicial function. Equally important is the exercise of power of mercy, a responsibility that has been donated under the Constitution (2010) to the President acting on recommendations by the Power of Mercy Committee. This is an important role which has both constitutional and statutory underpinning.

It is for that reason that I would hesitate to take the route suggested by my learned brother in the SOM case, supra where he declared that the name of the President be replaced with that of the court in section 166 of the CPC untenable.

21. In addition, once a trial court passes sentence after conviction, it becomes *functus officio*, and can no longer handle the matter again. Unless of course for purposes of review where that is applicable. The case file will have come to an end and will be marked concluded. I would hesitate to keep the matter open for further periodic action after concluding it as, in my view, it would render the doctrine of *functus officio* nugatory.

22. I can understand the frustrations we face as a court when you find children you detained at the President’s pleasure still incarcerated several years later, and worse still without any word from the POMAC or Ministry concerned.....”

13. In Hussan Hussein Yusuf Vs Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016] eKLR, Kiarie J, held that:

“Section 167(1) of the CPC which directs that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the pleasure of the President is unconstitutional as it violates Articles 25 and 29 of the Constitution that prohibit cruel, inhuman and degrading treatment. The learned judge reiterated this position in B K J Vs Republic, Meru HC Criminal Appeal No 16 of 2015 [2016] eKLR. In Joseph Melikino Katuta Vs Republic, Voi HC Criminal Appeal No 12 of 2016 [2016]eKLR, Kamau J, emphasized the point that keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of the Constitution.”

14. It is clear under sub-section (5) that the President is empowered, not to pass a sentence over the person against whom the court has entered a special finding under sub-section (1), but a power of mercy. The



former is a judicial function and the latter is an executive responsibility. A further reference is made to the Privy Council decision in *Reyes Vs R* (Belize) (2002) UKC 11:

"The board is mindful of the constitutional provisions governing the exercise of the Power of Mercy by the Governor-General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter is an executive responsibility."

15. Lessit J (as she then was) held, the view which this court also adopts, that the judicial function to pass sentence is reserved to the judicial process and cannot be taken away from it. However, the law gives the Executive a responsibility to make a determination whether a person need not suffer the punishment imposed against him by the court, and may remit such punishment for some reason, in certain cases. That executive power has constitutional underpinning under [See Article 133 of the *Constitution*].
16. It is clear that passing sentence is an integral part of the judicial function and as guided by the Court of Appeal in the case of *Dismas Wafula Vs Republic* [2019] eKLR where the Court of Appeal held that:

"In appropriate case therefore, the court freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demands. On the other hand, the court cannot be restrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing. [Also See *Eliud Waweru Wambui Vs Republic* [2019] eKLR]."
17. In reference to the case herein, I have considered the circumstances that led to the commission of the offence. I have also considered the psychiatrist report that was prepared after the court ordered for the same. It shows that the applicant was suffering from an Acute Psychotic Episode which currently is on remission and further I have also read the Probation Officer's Report and, the Pre-sentence report which I also find positive. I note that the members of the applicant's family and the community where she comes from have welcomed the idea of having her reintegrated back to the society.
18. The applicant herein was arrested sometime in 2012 and charged with the offence of murder, and that she has been in custody for over ten years and has since recovered from the mental illness and further, has benefitted from rehabilitation programs within the prison.
19. Having considered the facts of this case and all the relevant factors pertaining to sentencing, I hereby order that the applicant be released unless otherwise lawfully held.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner.



.....for the Respondent

