



**Mutuku v Republic (Criminal Miscellaneous Application E118 of 2024)
[2025] KEHC 14453 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 14453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION E118 OF 2024
NIO ADAGI, J
SEPTEMBER 23, 2025**

BETWEEN

RICHARD MUTUA MUTUKU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This ruling is on the applicant’s Notice of Motion application dated 13th September 2024 and supported by the applicant’s supporting affidavit sworn on the even date. The applicant seeks for orders that:-
 - i. That the Honourable Court be pleased to consider the directives in Isaac Ndegwa Kimaru & 17 Others v Attorney General & Another; Kenya National Human Rights and Equality Commission (Interested Party) [2022] eKLR and revise the sentence of President’s pleasure the applicant is serving to time served.
 - ii. That the Honourable Court be pleased to make appropriate orders and directions upon taking into account the mental status of the applicant during trial and the period the applicant had been detained in prison at the President’s pleasure.
 - iii. That the Honourable Court be pleased to consider time spent in custody and when giving sentence to run from the date of arrest pursuant to section 333 (2) of the Criminal Procedure Code.
 - iv. Spent.
 - v. That the Honourable Court be pleased to grant any order (s) that this Honourable Court may deem fit.
2. The application is based on the grounds that:-



- a. That the applicant was charged before the High Court at Machakos for the offence of Murder contrary to Section 203 as read with 204 of the Penal Code vide Criminal Case Number 78 of 2010.
- b. That the applicant was tried, convicted and sentenced to Presidential Pleasure by Honourable D.K. KIMEI J. on 19th April 2018.
- c. That following the orders in *Isaac Ndegwa Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* [2022] eKLR, the applicant seek leave of this Court to revise his sentence to a determinate one and possibly time served as he has stayed in prison since 28th September 2009.
- d. That the same implementation of the judgement of Isaac Ndegwa Kimaru case was reiterated by the High Court in Nairobi in *HMM v Director of Public Prosecutions & Another* (Constitutional Petition E323 of 2020) [2023] KEHC 2620 (KLR).

Brief Facts of the case

3. The applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and upon full trial, he was found guilty but insane and subsequently sentenced to custodial sentence under the Presidential pleasure, by the Machakos High Court in Criminal Case No. 78 of 2010. The particulars were that on 29th November 2010 at Kathangathini village, Matuu location, Yatta district within Masaku County murdered Ndunge Ivongo.
4. The Prosecution called 6 witnesses to support its case and the Applicant was found guilty of the act or omission but was insane when he did the act or made the omission on 19th April 2018.
5. The Applicant has not appealed to the Court of Appeal.

Applicant's Case

6. In the instant application, the applicant argues that he was sentenced to President's pleasure, which is a discretionary sentence often applied to offenders with mental incapacity. Courts have ruled that indefinite detention under this provision, is illegal as it interferes with the principle of separation of powers since the sentence is not within the Penal Code which defines the offences and respective penalties therein as formulated by the legislature. Being a prerogative vested upon the President's office therefore means its originality rests upon the executive whose mandate demands separation of powers. Article 160 of *the Constitution* states that, in the exercise of judicial authority, the Judiciary as constituted by Article 161 shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
7. The applicant submits that in the event that this honourable court considers the respondents submissions positively, there shall be an evident injustice since no control of direction or authority of any other person is to influence judicial officers from performance of their duties.
8. In the circumstances the applicant prays that the court be persuaded to find the respondents submissions without any legal probative value and substitute the custodial sentence of presidential pleasure with the term of fifteen years already served.



Respondent's Case

9. The Respondent is opposed to the instant application and submits that the High Court and fully analysed the evidence of the Prosecution's case and rightfully concluded that the Prosecution proved its case beyond reasonable doubt proving all the ingredients of the offence of murder.
10. The respondent submits that the applicant has based his application upon the judgment in Isaac Ndegwa Kimaru & 17 Others vs AG & Another (2022) eKLR which case dealt with persons who had been detained at the President's pleasure without definite timelines, infringing on the right to fair trial, dignity and liberty. The applicant in this case has not been detained at the President's pleasure. As per the judgment delivered by Justice Kemei, the applicant was declared guilty but insane. In the applicant's case the case does not involve indefinite detention but rather a definite custodial order with periodic reviews thus the case is distinguishable. The respondent cited the case of Republic v S.O.O [2019] eKLR in which the court clarified that where an accused is found guilty but insane, the detention order must be regularly reviewed and is not indefinite per se.
11. The respondent further submitted that the applicant seeks to have the sentence reviewed. That a revision cannot be used to challenge a conviction or sentence unless there is manifest error, illegality or impropriety. The issues raised in the application would be best canvassed and more appropriate for appeal. Reliance was placed on the case of Republic v James Kiarie Mutunge [2011] eKLR where the court held that revisionary powers are limited and not meant to address disputed facts or re-trial cases.
12. Also cited was the case of William Mwangale Ongoma v Republic [2020] KEHC 1446 (KLR) where the learned Judge held that:

“.....A court in revision is not concerned with the merits of the decision of the court but rather on the impropriety, mistake, illegality of the order, sentence or judgment... .. This court 's powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under Article 165(6) of *the Constitution* the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice... ..”
13. The respondent argues that the sentence issued to the applicant was proper and within the law under the circumstances. The decision of the court was not improper, not a mistake neither was it illegal. The same was reiterated in the case of Manyeso v Republic [2023] KECA 827 (KLR).
14. That the sentence imposed on the applicant at the time was the lawful sentence under the prevailing statute. At the time of conviction and sentencing, the law allowed such orders for persons found guilty but insane thus the sentence remains lawful. In Republic vs Mwasya Mutunga [2020] eKLR it was held that a sentence imposed under the legal framework existing at the time cannot be declared unconstitutional retrospectively without specific constitutional basis.
15. The respondent submits that under the *Mental Health Act* and the *Prisons Act* avenues for medical oversight and periodic reviews is provided for. The applicant has not demonstrated that he does not have access to such mechanisms. It is submitted that the applicant's constitutional rights have not been violated. Reference is made to the case of Republic vs John Kariuki Njuguna [2018] eKLR where the court upheld the lawfulness of detention under mental health considerations when due process was followed.



16. Further that in murder cases, the interests of the victims and society must be balanced with those of the convict. In some cases, a sentence review without adequate basis and exceptional circumstances undermines the rule of law. In *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR the Supreme Court emphasized that justice must consider victims' rights alongside those of the accused. In this case the applicant had the intention of killing the deceased.
17. The respondent referred to the famous case of *Francis Muruatetu v Republic* which dealt with the issue of the mandatory nature of the death penalty. The Supreme Court held that the mandatory nature of the death penalty was unconstitutional thus giving a chance for murder convicts to approach the trial courts for mitigation and re-sentencing. The case did not touch on any other sentences as prescribed by law.
18. The respondent submitted that this court has no jurisdiction to entertain the application for review of the sentence herein for the reasons mentioned above and urged this court to dismiss this application in its entirety for lack of merit.

Analysis and Determination

19. The applicant seeks to have his sentence of President's pleasure he is serving reviewed.
20. The applicant was charged before the High Court at Machakos for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code vide Criminal Case Number 78 of 2010.
21. The applicant was tried, convicted and sentenced to Presidential Pleasure by Hon. Justice D. K. Kemei on 19th April, 2018 by virtue of being guilty but insane pursuant to the provisions of Section 166 of the Criminal Procedure Code. That following the orders in *Isaac Ndegwa Kimaru & 17 others v Attorney General & Another; Kenya National Human Rights and Equality Commission (Interested Party)* [2022] eKLR, the applicant seeks this Court to revise his sentence to a determinate one and possibly time served as he has stayed in prison for nineteen (19) years since 28th September 2009.
22. {I have considered the application and the Parties' submissions filed in advancing their respective arguments on the same. The only issue for my determination is whether the application is merited.
23. Unfortunately, I notice that there is no recent Psychiatric Report or Social Inquiry Report regarding the applicant's mental health condition in order that this court can review the same and make a considered decision on the application.
24. In the circumstances, I will order that a recent Psychiatric Report and a Social Inquiry Report regarding the applicant's mental health condition be presented before court for review and consideration and for an informed decision on the application dated 30th May 2025.
25. The matter to be mentioned on a date to be fixed by the court to confirm availability of the Psychiatric Report and a Social Inquiry Report regarding the applicant's mental health condition of the applicant and for further orders.

RULING WRITTEN, SIGNED & DATED AT MACHAKOS THIS 23RD SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 23RD SEPTEMBER 2025

In the presence of :

In person..... for Appellant



Ms Agatha..... for Respondent

Milly grace..... Court Assistant

