REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL MISC. APPLICATION NO. E087 OF 2024

JM…….. APPLICANT

-VERSUS-

REPUBLIC……RESPONDENT

RULING

Background

1. The applicant was charged with murder contrary to section 203 as read with 204 of the Penal Code in Embu HCCRC 9 of 2001. He was found guilty but insane at the time of committing the offence. The trial Judge invoked section 166(1) of the Criminal Procedure Code and ordered that the case be reported to the President and in the meantime, the applicant be kept in appropriate custody. The applicant has been held at various prison facilities since the judgment to date.

Application

2. Vide notice of motion dated 25th November 2024 the applicant seeks orders:
    1) Spent;
    2) That the Honourable Court be pleased to consider the directives in **Isaac Ndegwa Kimaru & 17 others v Attorney General & another; Kenva 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;
    3) 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 has been detained in prison at the President's Pleasure;
    4) 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;
    5) That the Applicant be exempted from paying costs as he is a pauper; and

6) That the Honourable Court be pleased to grant any other order(s) that this Honourable Court may deem fit.

3. The applicant stated that since the special finding was made, he has received treatment at Mathari Mental Hospital on two occasions and he is mentally stable. He urged the court to release him from the indeterminate sentence which was based on a law that has since been declared unconstitutional according to the cases of **Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR)** and **HMM v Director of Public Prosecutions & another (Constitutional Petition E323 of 2020) [2023] KEHC 2620 (KLR)**.

Response

4. The respondent did not oppose the application.

Submissions

5. In its submissions, the respondent stated that the court has jurisdiction to determine the application and it relied on section 362 of the Criminal Procedure Code. It also relied on the cases of **R. v JKN (2020) eKLR** and **R. V SOM (2018) eKLR**. It argued that there are several factors to be considered by the court in resentencing the applicant who was found guilty but insane. That the probation officer's report is unfavourable and the court should pay attention to it.

Probation Officer's Report (POR)

6. The court ordered that a POR be filed before determination of the application. From this report, it emerged that the applicant developed a mental illness around the time when his father died and it prevailed. Even before the incident leading to the death of the deceased, the applicant is said to have had violent tendencies, restlessness, racing thoughts and outbursts.
7. Most of his family members are apprehensive that if he is released, the untowardly tendencies will persist. His wife is also afraid of the applicant as she remembered his erratic behavior before he was incarcerated. Some members of the community have no problem if the court decides to grant the applicant a non-custodial sentence but they have warned that they will not tolerate his erratic behavior. The

report disclosed that the safety of the applicant is not guaranteed within the community as the deceased's family is still bitter about the loss of their kin.

Issue for Determination

8. From the foregoing, the issue for determination is whether the orders sought should be granted.

Analysis and Determination

9. The application has been brought under Articles 50 and 165(6) and (7) of the Constitution. Article 165(6&7) Provides:

> ***"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

10. The High Court's supervisory jurisdiction in criminal cases is also established under Section 362 of the Criminal Procedure Code as follows:

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

11. In the Malaysian case of ***Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735*** it was held:

> ***"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any***

order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion… This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

12. In a murder trial, the High Court sits as a court of original jurisdiction and in this case, it tried the applicant, convicted him and passed the sentence. There is provision for resentencing hearings following the findings of the Supreme Court in **Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) (Muruatetu 1).** The Supreme Court, through jurisprudence in this case, donated jurisdiction to the High Court to rehear sentences in murder cases even though it sat to hear the cases in the first instance. Following **Muruatetu 1**, Paragraph 4.8.18 of the Judiciary Sentencing Policy Guidelines 2023 emerged and it provides:

"Resentencing cases shall be handled by the 'Sentencing Court' – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts."

13. In the case of the applicant, a special finding of guilty but insane was made by the court and the applicant has been held at the President's pleasure since conviction. This special finding is provided for under sections 162-167 of the Criminal Procedure Code. On this score, the High Court at Nairobi made a determination in the case of **Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (supra)** 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 are unconstitutional as they offend the doctrine of separation of powers. These provisions were held as null and void.

14. The applicant is still in custody serving an undefined term. So far, he has been in prison for about 24 years since he was placed at the President's pleasure. He has been treated on several occasions at a mental hospital and he has deposed that he is not mentally fit to reintegrate back into the society. Not everyone in the

community would be happy to have the applicant back into the society if the court chose to release him because he was always a nuisance to them.

15. With the declaration that the provisions on whose strength the applicant is still in custody are now unconstitutional, the court must do the right thing in the eyes of the law; that is, review the applicant's sentence. The applicant was sent to prison in 2006 where he has received treatment for his medical condition. He may require medical attention even going forward.

Disposition

16. In the circumstances of this case, I think that the application should succeed. I therefore order as follows:
    a. The order of this court issued on 29th September 2006 that the applicant's case be reported to the President and that in the meantime, he be kept in appropriate custody, is hereby set aside;
    b. The applicant shall be released forthwith, unless he is otherwise lawfully held, on grounds 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 are unconstitutional and therefore null and void.
17. Orders accordingly.

Delivered, dated and signed at Embu High Court this 12th day of November, 2025.

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R. MWONGO
JUDGE

Delivered in the presence of:

1. Miss Nyika for the Respondent
2. Applicant present in Court
3. Francis Munyao - Court Assistant