

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HIGH COURT CRIMINAL MISCELLENOUS NO. E054 OF 2024

DANIEL KYALO MAUNDUAPPLICANT

-VERSUS-

REPUBLIC.....RESPONDE
NT

RULING

1. The Applicant in this matter was tried and convicted by this court for the offence of murder. The Applicant was charged with Murder contrary to Section **203** as read with Section **204** of the Penal Code. He was however convicted for the lesser offence of Manslaughter contrary to Section **202** as read with Section **205** of the Penal Code and sentenced to life imprisonment.
2. The Applicant appealed to the Court of Appeal which on **30th April 2010** allowed his appeal on both conviction and sentence, quashed the conviction and set aside the sentence. The Court of Appeal substituted thereof a special finding under Section 166 of the Criminal Procedure Code that the Applicant was guilty of causing the death of his deceased brother but was insane when he caused the death. The case was reported for the order of the President under Section 166 (2) of the Criminal Procedure Code. The Appeal court further held that since the Applicant was still seeing visions as he told the court at the hearing of the appeal, he was committed to the custody of Mathari Mental Hospital in the meantime.
3. The Applicant has now moved this court vide a Notice of Motion application dated 9th May 2024 for orders that: -
 - a. Spent

- b. That the Honourable Court be pleased to grant mitigation and resentencing hearing
4. The Applicant set out the following grounds on the face of this application:
 - a. That the applicant was charged before the Machakos High Court vide High Court Criminal Case No. 7 OF 2001 for an offence of Murder contrary to Section 203 as read with Section 204 of the penal code.
 - b. That the Applicant was then tried, and sentenced to suffer death on 13/12/2005.
 - c. That the Applicant being dissatisfied with the conviction and sentence imposed by the High court then lodged an appeal to Nairobi Court of Appeal vide Criminal Appeal No. 26 OF 2006 which was later dismissed on 30/4/2010 by Justices Okubasu, Githinji and Tunoi (JJA).
 - d. That the applicant prays that this Hon. court to review death sentence meted on him by the High court.
 - e. That the applicant has undergone Rehabilitation programs in prison which he will adduce during the Hearing of this Application.
5. The Applicant has also sworn an affidavit in which he deposes that he is of sound and therefore competent to swear the affidavit. He also deposes that he is remorseful of the offence he committed and is prepared for integration back in the society.
6. The Applicant although in the application prayed that this court reviews his death sentence, this court has since established that the death sentence was set aside and could

be what he meant is for this court to set aside the sentence detaining her at the president's pleasure and substitute it with an order that meets the ends of justice. In making the prayer, the Applicant has pleaded with this court to consider the period he has been in custody since his arrest sometime in **January 2000** to date which is about twenty-six **(26) years** he has spent in prison due to his mental state to be enough retribution.

7. The Applicant stated that he has undergone rehabilitation programs in prison and undertook to adduce proof at the hearing of this application but he failed to do so.
8. In opposing the instant application and praying that it be dismissed in entirety, the State filed grounds of opposition dated 28th October 2024 as follows:-
 1. THAT the orders sought are incapable of being granted by this Honourable Court.
 2. THAT the application filed herein is not only misconceived and bad in law but also misplaced since this court is functus officio in this matter.
 3. THAT this Honourable court lacks jurisdiction to hear and determine this application since the sentence sought to be reviewed was passed by the Court of Appeal and this court had no supervisory jurisdiction over that Court as provided under Article 165(6) of the Constitution.
9. The Applicant made oral submissions to the application but which was just reading out his judgement by the Court of Appeal.
10. The Respondent informed the court that they had managed to retrieve the Court of Appeal Judgement from KLR Website

which was shared to the Applicant and the Court. The Respondent indicated that considering the sentence of holding someone at the President's pleasure had been declared unconstitutional, the invited the court to render a ruling on the application.

Analysis and Determination

11. I have considered the application and the supporting affidavit thereof, the grounds of opposition and the Judgements of the Court of Appeal and High Court. I have also considered recent precedents on the detention under Presidential Pleasure.
12. The instant application thrusts to the fore a situational challenge that Section 166 of the Criminal Procedure Code presents to the courts whenever they have to deal with persons who are arraigned before them while suffering from a mental health condition or are put on trial and in the course of it getting afflicted by a disease of the mind or worse still are found guilty but insane.
13. In **Wambugu v Director of Public Prosecutions (Criminal Miscellaneous Application E304 of 2023) [2025] KEHC 1284 (KLR) (Crim)(17 February 2025) (Ruling)Neutralcitation:[2025] KEHC 1284 (KLR), A.M Muteti, J stated:**

"The Criminal Procedure Code inherited from our colonial masters has remained largely static and unresponsive to present realities in a world where the Human rights discourse around mentally ill persons has continued to evolve.

The courts have pronounced the unconstitutionality of this Section but sadly no reforms have been undertaken to remedy the situation. The courts continue to be inundated with applications seeking to have persons found unfit to stand trial placed in custody as the

continue to receive treatment in the hope that at some point they would be mentally fit to stand trial”.

14. In **Akide v Republic (Criminal Appeal 39 of 2021) [2024] KECA 1176 (KLR) (20 September 2024) (Judgment)** the learned bench of the Court of Appeal was confronted with a case similar to that of the applicant and while deciding the elements under a person convicted under Section 166 of the criminal procedure code held;

*“... We have set out the legal provisions guiding the finding of guilt and come to the conclusion that, under the Penal Code, the appellant was not criminally responsible for causing death to the deceased. He could not be held to have been guilty of such an act. We therefore associate ourselves with the opinion of this Court in **Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR)** in which it expressed itself as follows:*

"We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the Criminal Procedure Code in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity."41.A holistic consideration of the legal provisions underpinning a finding of criminal culpability

leads us to the conclusion that, in the circumstances of this case, the trial court ought to have returned a finding of not guilty by reason of insanity.

*Section 166 of the Criminal Procedure Code has been the subject of several judicial pronouncements in this country. In the case of **Hassan Hussein Yusuf v Republic [2016] eKLR, the High Court of Kenya at Meru** (Kiarie Waweru Kiarie, J.) held that the provisions of section 167(1) of the Criminal Procedure Code requiring an accused person to be detained during the President's pleasure was unconstitutional for being discriminative to people with mental illness; that the appellant should be accorded mental treatment and be set at liberty if, in the opinion of a psychiatrist, he would not pose any danger to the public and to himself; and that, if the opinion of the psychiatrist is otherwise, he be admitted for treatment until such time as it would be safe to release him....(Continued...) As regards the sentence, we find that it would be a misnomer to "sentence" a person found not guilty. We agree with the opinion of Kiarie Waweru Kiarie, J. in the case of Hassan Hussein Yusuf v Republic (*supra*) and hereby direct that:*

a.the appellant shall, as soon as practicable and within 7 days from the date hereof, be subjected to mental examination by a psychiatrist at Malindi General Hospital or at any other recognized medical facility to determine whether he poses danger to the public or to himself, and that in the event of a finding that he no longer poses such danger, be set at liberty forthwith unless otherwise lawfully held.

b.should the psychiatrist be of the view that the appellant requires further treatment, he shall be admitted for treatment at a mental health facility recommended by the psychiatrist until such time as it will be safe to release him.

c.in the event that any further directions are required to implement this order, the parties shall be at liberty to seek further orders from the High Court”.

15. In this case, the Court of Appeal on **30th April 2010** allowed the Applicant’s appeal on both conviction and sentence, quashed the conviction and set aside the sentence. The Court of Appeal substituted thereof a special finding under Section 166 of the Criminal Procedure Code that the Applicant was guilty of causing the death of his deceased brother but was insane when he caused the death. The case was reported for the order of the President under Section 166 (2) of the Criminal Procedure Code. The Appeal court further held that since the Applicant was still seeing visions as he told the court at the hearing of the appeal, he was committed to the custody of Mathari Mental Hospital in the meantime. The Applicant has deponed that he is of sound mind.
16. In view of this, this court finds that the special finding that the Court of Appeal made in 2010 in respect of the Applicant cannot stand in light of the recent jurisprudential developments in this country. The same is hereby set a side since the Applicant cannot now be held indefinitely, the only recourse open to this court would be to make an order that would best serve the interests of justice in the circumstances.
17. Accordingly, it is ordered that the Applicant be forthwith set at liberty unless otherwise lawfully held.
18. Orders accordingly.
19. This Miscellaneous file is closed.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 23RD
FEBRUARY 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS 23RD FEBRUARY
2026