



REPUBLIC OF KENYA



**AHK v Republic (Miscellaneous Criminal Application E365 of 2024)
[2025] KEHC 3014 (KLR) (Crim) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL**

MISCELLANEOUS CRIMINAL APPLICATION E365 OF 2024

CJ KENDAGOR, J

FEBRUARY 27, 2025

**IN THE MATTER OF MISC. APPLICATIONS 262 OF 2019, E365 OF 2024
AND E456 OF 2024 (CONSOLIDATED) AND CRIMINAL CASE NO. 2 OF 2005**

BETWEEN

AHK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. AHK faced a murder charge in High Court of Kenya at Nairobi, Criminal Case No. 2 of 2005.
2. He was found to be a person of unsound mind and the Trial Court ordered for his detention at the President's pleasure on 29th September, 2010, under Section 166 of the *Criminal Procedure Code*.
3. Currently before this Court are two applications regarding the Applicant: one in case number Misc. E 365 of 2024 and the other in case number Misc. E 456 of 2024.
4. In the first application dated 2nd October, 2024, the Applicant seeks the following orders that; -
 - I. This Honorable 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. The Honorable Court be pleased to make appropriate orders and directions upon taking into account the mental status and the age of the applicant during trial and the period the applicant has been detained in prison at the President's Pleasure.



- III. The Honorable 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. The applicant be exempted from paying costs as he is a pauper.
 - V. The Honorable Court be pleased to grant any other order(s) that may deem fit.
5. The grounds for the application are outlined (in the application dated 2nd October, 2024) which include:
- I. That the Applicant was charged before the High Court at Nairobi for the offence of murder contrary to Section 203 as read with 204 of the Penal Code vide Criminal Case Number 2 of 2005.
 - II. That the Applicant was tried, convicted and sentenced to Presidential Pleasure by Hon. Justice Lesiit on 29th September, 2010 by virtue of being guilty but insane.
 - III. 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 leave of this Court to revise his sentence to a determinate one and possibly time served as he has stayed in prison for nineteen (19) years.
 - IV. That the same implementation of the judgment 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).
6. The second application was submitted by DAD, the Appellant's brother. He moved the Court via an application dated 5th December, 2024, filed in Misc. 456 of 2024, seeking orders that: -
- I. This Honorable Court be pleased to order the release of the Applicant from Kamiti Maximum Prison to the care and accommodation of DAD, his brother.
 - II. This Honorable Court be pleased to declare DAD as the guardian of the Applicant herein upon his release from Kamiti Maximum Prison.
7. In support of the application, his brother DAD submitted that; -
- I. As a family, they have held meetings and decided to forgive the Appellant, as he did not intentionally kill the deceased.
 - II. He is ready and willing to serve as the guardian of the Applicant, ensuring that he is accommodated, cared for, and does not cause harm to anyone upon his release from Kamiti Maximum Prison.
 - III. He will take the Applicant to Masallani Mental Hospital in Garissa County for a medical examination and to obtain his prescriptions for the mental illness, as advised by the psychiatrist who assessed him.
 - IV. That their family home is large enough to accommodate the Appellant, and that he will dedicate time to support the Applicant, accompanying him at home or anywhere he wishes to go. That if he is unavailable, he will delegate someone else to care for him.
 - V. He will also take the Applicant for Quran and spiritual healing sessions in Masallani, Garissa County.



- VI. He will consistently provide essential amenities for the Applicant and supervise him frequently to ensure that his needs are met for improving his mental condition.
- VII. He undertakes to be the guardian of the Applicant and to be responsible for him throughout his recovery process.
8. The two files were consolidated on 17th December, 2024, as they pertained to the same subject matter. Misc. 262 of 2019 is now resolved since it sought orders for the Appellant to be escorted to a hospital for a mental assessment.
 9. I have considered the two applications and the affidavits in support. I have also considered the Psychiatric Assessment Report dated 12th February, 2025 and filed in Court on 14th February, 2025 and the Social Inquiry Report dated 17th February, 2025 and filed in Court on 17th February, 2025.
 10. The current application highlights the significant challenges that the criminal justice system presents to the Courts when addressing individuals who are arraigned and suffer from mental health conditions.
 11. The Applicant was charged with the offence of murder involving SAAD, his nephew. The accused person was tried and found to be a person of unsound mind when he committed the offence and therefore detained at the President's Pleasure.
 12. I conducted a search and found his listing as Petitioner for Exercise of Power of Mercy by The Power of Mercy Advisory Committee (POMAC) Petitions Hearings and interviews scheduled from 16th to 26th May, 2022. It is clear that his ongoing detention suggests that a definitive decision has yet to be made regarding him.
 13. The Applicant seeks to have this Court revisit the decision and make resentencing orders that mirror the present jurisprudence in the handling of accused persons with mental health challenges.
 14. The medical evidence presented states that the Applicant is suffering from a mental health condition (schizophrenia).
 15. Upon receiving this application, a comprehensive medical report was called for to assess his mental health status. The report, which included evaluations from qualified mental health professionals, clearly indicates that the Applicant, although suffering from mental illness, is not a danger to themselves or others in their environment. Furthermore, the report emphasizes the necessity for ongoing treatment and regular follow-up appointments to ensure the Applicant's emotional and psychological stability.
 16. The Court must now determine the best course to take in respect of the Applicant considering his present mental condition in line with the decisions of the courts in respect to mentally challenged persons.
 17. In support of his application, the Applicant's Counsel has cited the decision in *Isaac Ndegwa Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* [2022] eKLR, where the Court made the following findings: -

- I. The detaining of persons facing criminal trials or having been tried and special findings made that they are 'guilty but insane' in prisons at the President's pleasure pursuant to 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* or under any other law constitute a threat to the doctrine of separation of powers and the independence of the Judiciary.



- II. 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 contravene 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.
- III. An Accused who is found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused who is tried and convicted of a criminal offence, but was found insane at the time of committing the crime is a person with disability and ought to be accorded the necessary protection and assistance required under the Constitution and the law.
- IV. The 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."
18. The Applicant's family, through the Applicant's brother, stated that they did not know how to address the issue following the detention as they could not comprehend what to do and could not afford an Advocate. The Supporting Affidavit and the Social Inquiry Report demonstrate that the family is not only prepared but also enthusiastic about assuming responsibility for the Applicant's care. They have expressed a strong commitment to ensuring that he receives any necessary medical treatment and have already researched local healthcare options to facilitate this. Furthermore, the report highlights that the family environment is stable and supportive; there are no existing circumstances - such as financial instability or interpersonal conflicts — that would suggest that the Applicant's release would lead to any issues or discord within the community. Their proactive approach and dedication underscore a genuine willingness to provide a nurturing and safe home for him.
19. He has been in custody for nearly 15 years, and his mental condition remains unchanged. He was unable to answer basic questions during the proceedings, and the prison officers who presented him during the online sessions confirmed that he could not grasp what was happening. It is noteworthy that during his lengthy incarceration, he has not demonstrated any tendency to harm himself or others, confirming that he does not pose a risk to the safety of those around him.
20. The prison certainly is not a place for a mentally ill person taking into account Section 2B of the Mental Health Act and also reiterated by the Supreme Court in Petition No. 10 (E013) of 2022 which held *inter alia*:
- “ ... This Court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual and society at large, from the adverse effects of mental illnesses and disorders.
- Therefore, in determining cases of mental incapacity, and bearing in mind that conclusions cannot be transposed from one case to another ...”
21. After reviewing the Psychiatric Report dated 12th February, 2025, the Social Inquiry Report dated 25th February, 2025 and the relevant laws, the Court exercises its discretion regarding the resentencing applications and issues the following orders:



- a. AHK, who suffers from mental health condition and is detained at the President's pleasure by an order issued on 29th September, 2010, under Section 166 of the *Criminal Procedure Code*, is hereby released from custody.
- b. He shall be released to the care of his brother, DAD, pending a formal application for guardianship.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 27TH DAY OF FEBRUARY, 2025.

C. KENDAGOR

JUDGE

In the presence of:

Prof. Nandwa for Applicant

Applicant present

Mr. Omondi, ODPP for Respondent

DAD (appointed guardian)

