



SWW v Director of Public Prosecution (Miscellaneous Criminal Application E034 of 2023) [2025] KEHC 9403 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION E034 OF 2023**

EM MURIITHI, J

JUNE 26, 2025

IN THE MATTER OF APPLICATION, IMPLEMENTATION & ENFORCEMENT OF THE ORDERS DATED 1ST FEBRUARY 2022 IN HIGH COURT PETITION NO. 226 OF 2020 IN INK & 17 OTHERS

AND

IN THE MATTER OF SECTIONS 216,329 AND 333(2) OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF THE JUDICIARY SENTENCING POLICY GUIDELINES

AND

IN THE MATTER OF HIGH COURT CRIMINAL CASE NO. 17 OF 2014 AT KERUGOYA HIGH COURT

BETWEEN

SWW APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. This is a ruling on an application for release from custody of the applicant who has been custody under an order of the Court upon a finding of Guilty but Insane.



2. The Court (Gitari, J.) by Judgment delivered on 15th September 2020 made a special finding on the accused as follows:

“36. The Prosecution’s evidence has effectively proved that it is the accused who cause the death of the deceased. The accused was at the time labouring under a mental illness.

Conclusion

I find the accused person guilty of the offence as charged but insane. He will be dealt with as provided under section 167 of the [Criminal Procedure Code](#).”

3. The applicable provisions for the dealing with persons found guilty by out insane at the time of the Judgment in this case are set out in section 166 of the [Criminal Procedure Code](#) as follows:

“166. Defence of lunacy adduced at trial

1. Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
2. When a special finding is so made, the court shall report the case for the order of the President, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
3. The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
4. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President’s order and thereafter at the expiration of each period of two years from the date of the last report. Powers delegated to the Minister and to the Permanent Secretary of the Ministry for the time being responsible for prisons, by LN 579/1963.
5. On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring



the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

6. Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
 7. The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital. [*Act No. 22 of 1959*, s. 16, *Act No. 13 of 1967*, First Sch., LN 124/1964.]"
4. The Court respectfully notes the decision of the High Court (Mrima, J.) in *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (Judgment) relied on by the applicant, which has found the provisions of section 162-167 to be unconstitutional for placing the sentencing discretion in the executive rather than the court as follows:

“ 153. In the end, and flowing from the above, this court hereby makes the following final orders:

- a) A declaration hereby issues that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were ‘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.
- b) A declaration hereby issues 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* or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure contravenes 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](#). Such provisions are hereby declared unconstitutional, null and void.

- c) A declaration hereby issues that 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 of a criminal offence, and was found to have been 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.
- d) A declaration hereby issues that no court of law shall henceforth commit any person facing a criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President's pleasure pursuant to any law.
- e) A declaration hereby issues that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President's pleasure. For clarity, a prison facility shall only accept such persons with mental challenges committed to the facility under the orders of the court which orders shall not include any order to hold such persons under the President's pleasure.
- f) A declaration hereby issues that any continued detention of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were 'guilty but insane' and that they be detained at the President's pleasure.
- g) A declaration hereby issues that the Advisory Committee on the Power of Mercy established under article 133 of the [Constitution](#) has no jurisdiction to deal with persons with mental challenges who are facing criminal trials or who have been tried and special findings made that they were 'guilty but insane' until such a time when such persons are sentenced by Courts of Law.
- h) An order hereby issues that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was 'guilty but insane' and be detained at the President's pleasure shall forthwith make arrangements and arraign such a person before the court that committed the person to the prison facility.
- i) Once any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was 'guilty but insane' is arraigned before court pursuant to order (h) above, the court shall make appropriate orders and directions upon taking into account the mental status of the accused and the period the accused has been detained in prison at the President's pleasure.



- j) In the event the prison facility is unable to arraign such a person before court as ordered in order (h) above, the facility shall immediately so inform the court and the court shall make appropriate orders and directions as it deems fit.”

5. In response to the applicant’s Notice of Motion dated 9/8/2023, the Mr. Mamba for DPP in submission dated 16/1/2024 calls for a detailed report on the accused as follows:

“We submit that the applicant was indeed tried and found guilty and accordingly was convicted and sentenced and placed at the Prison pursuant to section 162 [4] and [5] of the *Criminal Procedure Code*.

We submit that this Court has jurisdiction to Order a detailed report from the prison facility in regards to the applicant and make appropriate orders.”

6. By a report from the Consultant Psychiatrist Nyeri Provincial General Hospital dated 9/01/2025 the accused is certified that “mental Status normal; fitness to plead – Fit to institute Court Process; Recommendation - proceed.” It would appear that the Doctor was responding to an enquiry whether the applicant could proceed with his trial and hence he certified him “fit to plead, to institute court process”.
7. Unfortunately, this report does not inform the Court of the matters required to be considered under the law as to the safety of the accused and the public, that is whether the accused is healed of his mental incapacity and whether he would upon release be a danger to himself or to other persons in his community and society. The Court must also consider, what appropriate treatment of the offender in the circumstances of his condition and the offence committed.
8. For the Court to be able to exercise its powers and discretion in this matter, a detailed report by the Prison authorities and or the Mathari mental Hospital where the applicant was treated as to the present circumstances of the accused as is contemplated in section is necessary. The Court shall also take advice from the Probation Office as to the circumstances of the applicant to enable the court consider the appropriate orders to make in the matter upon the report by the Prison/Mathari Mental hospital, as the case may be.

Orders

9. Accordingly, for the reasons set out above, the Court makes the following orders:
10. The Prison authority/Mental Hospital having custody, which has had custody, of the Applicant shall file with the Court a detailed report on the applicant’s treatment while he has been detained under the pleasure of the President indicating whether he is likely a danger to himself and others.
11. The Probation Office shall file a report on the applicant indicating his family, home and community circumstances and recommendations as to possible modes of dealing with the applicant.
12. The Court shall further consider the appropriate orders in the matter on 24/7/2025.

Order accordingly.

DATED AND DELIVERED ON THIS 26TH DAY OF JUNE 2025.

EDWARD M. MURIITHI

JUDGE



Appearances:

Mr. Mamba for the DPP.

Applicant in person.

