



**POO v Republic (Criminal Petition E004 of 2023)
[2024] KEHC 2930 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL PETITION E004 OF 2023
WM MUSYOKA, J
MARCH 22, 2024**

BETWEEN

POO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner seeks review of his sentence. He had been found guilty of murder, but insane, on 18th February 2019. He was sentenced to be detained at Busia GK Prison, pending the order of the President of the Republic.
2. The Republic has submitted that the petition is not merited, for the petitioner has not demonstrated that there is new compelling evidence to warrant review. It is submitted that a person serving a sentence such as that imposed on the petitioner was to be kept in prison until it is determined that he is not a danger to the society. *Kimaru & 17 others vs. Attorney-General* [2022] KEHC 114 (KLR)(Mrima, J) is cited.
3. On 16th February 2024, I delivered a ruling herein, where I directed that the petitioner be presented before a psychiatrist for evaluation of his current mental status. That was done, and a report has been placed on record, dated 27th February 2024. It indicates that the petitioner displays no mental illness.
4. Detention of persons with mental challenges, convicted of murder or any other offence, is really not a punishment, for the trial court will have found that that person did not have the requisite mental capacity, at the time of the actus reus, to form an intention to commit the offence, or to have the knowledge that his conduct was wrong or prohibited. There would be no mens rea on his part, for commission of the offence. It was stated, in *Wakesho vs. Republic* [2021] KECA 223 (KLR) (Kairu, Mbogholi-Msagha & Nyamweya, JJA), that such a person would be incapable of understanding what



he is doing, or knowing that what he is doing is wrong, and that such a person would not be criminally liable.

5. Detention, during the pleasure of the President of the Republic, has been declared unconstitutional. See Republic vs. SOM [2017] eKLR (Majanja, J), [Republic vs. ENW](#) [2019] eKLR (Lesiit, J), [Wakesho vs. Republic](#) [2021] KECA 223 (KLR) (Kairu, Mboghohi-Msagha & Nyamweya, JJA) and [Kimaru & 17 others vs. Attorney-General](#) [2022] KEHC 114 (KLR)(Mrima, J). So, if that is so, no one should serve that sentence. Indeed, I said in my ruling of 16th February 2024, herein, following [Kimaru & 17 others vs. Attorney-General](#) [2022] KEHC 114 (KLR)(Mrima, J), that the petitioner herein should have been produced before a Judge sooner, so that he could be rid of the unconstitutional sentence.
6. The psychiatrist has given the petitioner a clean bill of mental health, as he displays no sign of mental illness. That would mean that he poses no danger to society. Consequently, the order that I shall make herein is to direct that the petitioner herein be released forthwith from prison custody. I shall further, direct, for the purpose of being assisted to find his bearing, once he gets back to society, that he shall serve a probation order, for 6 months, under the care and supervision of the Busia County Director of Probation and Aftercare Services. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 22ND DAY OF MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Philip Okurutu Okisai, the petitioner, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

