



**Ombima v Republic (Criminal Petition E003 of 2023)  
[2024] KEHC 7852 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL PETITION E003 OF 2023**

**JN KAMAU, J  
JUNE 26, 2024**

**BETWEEN**

**KEPHAR KAVAYA OMBIMA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner herein was charged and tried for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. He was convicted of the said offence and was sentenced to death.
2. Being dissatisfied with the said decision, he lodged an appeal in Kakamega HCCRA No 196 of 2012 whereby the appellate court affirmed his conviction and sentence.
3. Being dissatisfied with the first appellate court's decision, he lodged a second appeal at the Court of Appeal in Criminal Appeal No 54 of 2020 which he indicated was still pending determination but again stated in his affidavit that he had decided to withdraw it.
4. He filed the present Petition for review of sentence on 24<sup>th</sup> April 2023. In his affidavit in support thereof, he placed reliance on the cases of Benson Ochieng & France Kibe vs Republic [2018]eKLR, *Joseph Yusuf Mimo vs Republic* Criminal Appeal No 19 of 2010 (eKLR citation not given) and the case of *Godfrey Ngotho Mutiso vs Republic* Criminal Appeal No 17 of 2008 (eKLR citation not given) in arguing that the death sentence imposed on him was inconsistent with the *constitution*.
5. His undated Written Submissions were filed together with his Petition on 24<sup>th</sup> April 2023 while those of the Respondent's were dated and filed on 1<sup>st</sup> March 2024. The Ruling herein is based on the aforesaid Written Submissions that both parties relied upon in their entirety.



## Legal Analysis

6. The Petitioner submitted that the death sentence subjected him to inhuman and psychological torture. He invoked Article 23 and Article 26(3) of the constitution of Kenya 2010 and contended that the issue of death sentence had not been fully settled by the Kenya Judiciary and that it was retributive in nature and did not accord a convict an opportunity to reform.
7. He pointed out that he had been in custody for twelve (12) years and had been rehabilitated. He asserted that he had undergone rehabilitation programme at the prison school of theology and had attained diploma in Emmaus Bible School, Certificate in Emmaus Bible Study, Gospel Faith Messages Ministry, Prisoner's Journey, Prison Fellowship International and Bible League International. He was emphatic that he had reformed, of good character and law abiding because of the said programme and hence prayed for a second chance in life.
8. He placed reliance on the case of Benson Ochieng & France Kibe vs Republic (Supra) where the court resented the Petitioner to twenty (20) years imprisonment. He further urged the court to consider Section 333(2) of the Criminal Procedure Code when determining the sentence by considering the period spent in remand since his arrest in 2010. In this regard, he relied on the case of Ahamed Abolfadhi Mohammed & Another vs Republic [2018] eKLR.
9. On its part, the Respondent submitted that the High Court derived its jurisdiction from various statutes and Article 165 of the constitution. It asserted that the power to hear and determine petitions from persons convicted for criminal offences flowed from Article 50(6) and Article 50(2)(q) of the constitution.
10. It pointed out that the Petitioner had not exhausted all avenues available to appeal since there was a pending appeal at the Court of Appeal but because there were no express statutory provisions under which resentencing was conducted, this court could invoke its inherent jurisdiction to give effect to the decision of a superior court in order to give effect to the Muruatetu (sic) decision.
11. It cited the said case of Francis Karioko Muruatetu & Another vs Republic Petition No 15 & 16 Consolidated of 2015 (eKLR citation not given) where it was held that where an appeal was pending before the Court of Appeal, the High Court could entertain an application for resentencing upon being satisfied that the appeal had been withdrawn.
12. It added that his application did not meet the threshold set in Article 50(6) and Article 50(2)(q) of the constitution of Kenya. It urged the court to dismiss the Petition herein.
13. Right from the onset, this court noted that the Petitioner had a pending Appeal at the Court of Appeal in Kisumu Criminal Appeal No 54 of 2020. Although he mentioned that he had decided to withdraw the same, he had not adduced any Notice of Withdrawal filed at the Court of Appeal in Kisumu to show that he had indeed withdrew his second appeal.
14. Having said so, this court could not sit and determine a matter that was already in the hands of a superior court to it as the Respondent had submitted. This court's hands were tied and could do nothing to assist the Applicant herein.

## Disposition

15. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's undated Petition lodged on 24<sup>th</sup> April 2023 was not merited and the same be and is hereby dismissed.
16. It is so ordered.



**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF JUNE 2024**

**J. KAMAU**

**JUDGE**

