



**Republic v Shisebo (Criminal Petition E002 of 2023)
[2024] KEHC 11706 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL PETITION E002 OF 2023
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

EMMANUEL SHISEBO APPLICANT

JUDGMENT

1. The Petitioner herein was charged with the Offence of Robbery with Violence contrary to Section 296(2) of the *penal Code* at the Chief Magistrate’s Court at Kakamega. He was convicted and sentenced to suffer death.
2. His Appeals to the high Court, then to the Court of Appeal against the conviction and sentence were both dismissed.
3. The petitioner’s sentence was later commuted to life sentence by the president .
4. He has brought this Petition, seeking for review of sentence. He also seeks the court’s interpretation of the applicability of death sentence against the Supreme Court decision in the case of Francis Karioko Muruatete & Another versus Republic (2017) eKLR.
5. He pleads that his rights under Article 22(1), 23(1), 25(c),27,28,50(2)(p)(a) of *the constitution* were violated.
6. It is the petitioner’s case that he was sentenced to a mandatory sentence, without being given a chance to mitigate or to present the unique facts and circumstanced of his case; that the sentence was discriminatory as he was treated differently from people convicted of other offences.
7. He submits out that even though his sentence was commuted to life imprisonment by the president, the Life sentence has equally disenfranchised his dignity and limited his future prospects. He argues that there is no difference between the death and Life sentence.



8. It is further submitted that his continued incarceration without prospect of release, amount to cruel punishment, contrary to Article 28 and 29 (1) of the constitution.
9. He finally submits that the circumstance of his case does not call for death sentence or life sentence. He therefore seeks that the sentences be reviewed.
10. The respondent did not file any response to the petition.

Determination

11. The Petitioner was initially sentenced to suffer death by the Chief Magistrate's Court at Kakamega following a conviction of robbery with violence charge. He did not succeed in convincing the High Court and the Court of Appeal to reverse his conviction or sentence.
12. By his own admission his sentence was later commuted to life sentence by the president. I have perused the record and noted that indeed there is an endorsement on the committal warrant dated 30/8/2011 showing that on 20/10/2016 his death sentence was commuted to life sentence .
13. The Petitioner is also challenging this life imprisonment. His argument is that the net effect of the two sentences are the same. He argues that both sentences amount to cruel punishment and have curtailed his future .
14. Let me state from the onset that as at the time of filing this petition, the petitioner was serving a life sentence not death sentence. To purport to seek a review of both sentences is therefore misleading.
15. The imperative question is whether this court can review a sentence that was "handed down" by the President under the power of mercy exercised under Article 133 of the constitution
16. Under the said Article the President has powers to inter alia substitute a less severe form of punishment (Article 133 (1) (c)). He exercises that power pursuant to the advice of Power of Mercy Committee established under sub- Article (2) of the said Article.
17. While expounding on the powers bestowed on the President under Article 133(1) , Justice Mrima in *Kimaru & 17 others v AG & others* (2022) KEHC 114 (KLR) stated as follows: " the exercise of the power of mercy under Article 133(1) of the constitution only comes to the fore after an accused has been sentenced by the court. The powers are discretion to the president to exercise leniency on the sentence meted out against a convicted person. That is only after the judiciary has fully exercised its judicial functions in a criminal case".
18. In other words, the president comes in once the judiciary has completed its work, or has become functus officio. In commuting the Petitioner's sentence therefore , the president was exercising an executive function.
19. The next question then, is whether this court can go back and review the functions of the President, or whether this court should interfere with what is purely a Presidential function?
20. In the case of *Peter Kipkosgei versus Republic* (2022) eKLR Justice Ochieng held that " the functions exercisable by the President under Article 133 cannot be usurped by the courts".
21. On the other hand Justice Nyakundi in *Athmani Shushe Bahoki versus Republic* (2019) eKLR was of the view that the Petitioner has to demonstrate first that there are grounds for reviewing the President's decision and Applicant would have to approach the court by way of judicial review in any event.
22. In *Masake versus Republic* (2023) KEHC 662 (KLR) the High Court in Kilgoris stated as follows:-".....this court does not have jurisdiction in the matter of the Power of Mercy Act which is



a preserve of the executive and the institution established in the said Act. Any relief grantable under, must be processed within the structure of the *power of mercy Act*".

23. In Pascal versus republic (2022) KEHC 13197 (KLR), the High Court again, held " I also find that there is no constitutional or statutory law that enables an aggrieved party including the Applicant herein, upon where the State President has imposed a sentence, in accordance with the advice of the advisory committee to seek at review of such a sentence".
24. The petitioner herein was sentenced to death. It was upheld by all the appellate courts; later he benefited from the Powers of Mercy by the President under the Article 133 of *the constitution* and *Power of Mercy Act*.
25. what this court is being asked to review therefore is not the death sentence as aforesaid. That has been overtaken by events. What is subsisting is a Life Sentence handed down by the president under Article 133 of *the constitution* and the *Power of Mercy Act*.
26. I am persuaded by the decision of the High Court in Athmani Case (supra) that unless the Petitioner is challenging the process adopted by the committee which should then be brought to the court by way of Judicial review, the court has no jurisdiction to challenge the merit of the decision made by the president pursuant to Article 133 of *the constitution*.
27. In conclusion, it is my finding that this court does not have Jurisdiction to entertain this Petition. The same is hereby struck off.
28. The Petitioner has a right of Appeal within the next 14 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2024.

S. CHIRCHIR

JUDGE

In presence of:-

The Petitioner

MS. Osoro for the state.

