



REPUBLIC OF KENYA



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**Onzere v Republic (Criminal Petition E011 of 2023)
[2024] KEHC 15980 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION E011 OF 2023
JN KAMAU, J
DECEMBER 19, 2024**

BETWEEN

CYRUS KAVAYI ONZERE PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. His death sentence was subsequently commuted to life through a Presidential decree.
2. Being aggrieved by the decision of the Trial Court, he appealed at the High Court in Kakamega HCCRA No 184 of 2009. His Appeal was dismissed in its entirety.
3. Being aggrieved by the aforesaid decision, he lodged a second appeal at the Court of Appeal, Kisumu HCCRA No 166 of 2016 where the same was dismissed in its entirety.
4. On 17th October 2023, he lodged an undated Petition herein seeking for review of his death sentence as it was inhuman, excessive, demeaning and torturous.
5. He contended that his right to fair trial had been violated contrary to Article 50(2)(p), 29(d)(f), 27(1), (2) and (4) of *the Constitution* of Kenya, 2010. He asserted that Section 204, 296(2) and 297(2) were unconstitutional as the provisions therein did not accord him an opportunity to mitigate and attain a fair trial (sic).
6. He placed reliance on the cases of Robert Achapa Okello vs Republic and Paul Odhiambo Mbolla vs Republic (eKLR citation not given) without highlighting the holding he relied on therein.



7. He urged the court to consider Article 50(2)(q) of *the Constitution* of Kenya, 2010, his mitigation pursuant to Section 216 and 329 of the Criminal Procedure Code Cap 75 (Laws of Kenya), Section 333(2) of the said Code and to find that death and life sentences are unconstitutional.
8. His undated Written Submissions were filed on 30th April 2024 while those of the Respondent's were dated and filed on 22nd May 2024. This Judgment is therefore based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

9. The Petitioner submitted that constitutionally, this court had unlimited original jurisdiction in both civil and criminal matters which was termed as unique jurisdiction in the case of Protus Buliba Shikuku vs A.G (eKLR citation not given). He asserted that the High Court's jurisdiction was unique since it could review subordinate and superior court's decision. He pointed out that the High Court's revision ambit was described in Section 327(2), 362 and 364 of the Criminal Procedure Code as read with Article 165(3)(a), (b), (d)(i), (ii), (6) and (7) of *the Constitution* of Kenya, 2010.
10. He argued that the mandatory nature of sentencing under Section 296(2) took away the discretion of the Trial Court to impose a judicial evaluated sentence and resulted to a pre-determined sentence by the Legislature. He contended that that was contrary to the current jurisprudence whereby sentencing was a matter within the trial court's discretion as was held in the cases of Regan Murithi vs Republic, James Waweru Mwangi vs Republic and Robert Achapa vs Republic (eKLR citations not given).
11. He pointed out that the mandatory nature of sentence imposition had been challenged both nationally and internationally. In this regard, he placed reliance on the case of Yawa Nyale vs Republic, S vs Machunu & Another (AR 24/11) (2012) among others dealt with in Malawi and Robert vs Lonisiana 431 US 633[1977] where the common thread was that the courts therein held that sentencing was a legal issue which formed part of the principles of fairness and therefore required judicial determination in the course of trial and could not be achieved by legislative fiat.
12. He further submitted that the reasoning applied in the abovementioned cases was buttressed in the case of S vs Mofekeng 1999 (1) SACR 502(W) where it was held that the imposition of the minimum sentence by the Legislature severely curtailed the discretion of the court and offended the constitutional principle of separation of power of the Legislature and the Judiciary.
13. He was categorical that the imposition of the mandatory death sentences upon him was in contravention of Article 25 (c), 50(2)(p) and 160 of *the Constitution* of Kenya, 2010. He pointed out that due to the mandatory nature of the sentence, his mitigating circumstances such as rehabilitation, age, the fact that he was a first offender among other factors were not taken into consideration.
14. He asserted that *the Constitution* clearly provided that every person was equal before the law and has equal right, protection and benefit of the law. In that premise, he argued that a number of convicts who had been tried and sentenced to death had had their sentences reduced to definite jail terms through a similar application as his and hence to be denied the same would be in contravention with his constitutional rights under Article 27(1)(2) of *the Constitution* of Kenya, 2010.
15. He added that Article 50(2)(p) of *the Constitution* guaranteed every person the benefit of a least punishment. In that regard, he argued that although his death sentence was commuted to life imprisonment, the indefinite nature of the said sentence was also harsh, excessive, oppressive and inconsistent with the primary purpose of a sentence of imprisonment as prescribed in the United Nations Minimum Standard Rules (Mandela Rules No 4) and our correctional service (prison's) motto as well.



16. He contended that the sentence did not give him a chance to reform or atone for the offence he had committed and that its nature had disenfranchised his ability to have a future based prospect of release contrary to Article 28 of *the Constitution*. He urged the court to allow his application. He cited Section 216 and 329 of the Criminal Procedure Code and Article 27 of *the Constitution* of Kenya, 2010 and placed reliance on the cases of Susan Kagora & 316 Others vs Uganda and Shaban Salim Ramadhan & 8 Others vs Republic Petition No 5 and 6 of 2022 (eKLR citation not given) without highlighting the holding he relied on therein.
17. He pleaded with court to consider that he was a first offender and remorseful of the offence he committed. He urged the court to grant him a second chance in life. He pointed out that for the period that he had been incarcerated, he engaged with fellow inmates peacefully and had undergone various rehabilitation programmes for which he had acquired both spiritual and life skills which would enable him re-integrate back to society. He sought for a lenient sentence and relied on the case of George Munyinyi Kihuyu vs Republic and Daniel Gichimu & Another vs Republic (eKLR citations not given) without highlighting the holding he relied on therein. He also urged the court to consider Section 333(2) of the Criminal Procedure Code while reviewing his sentence.
18. On its part, the Respondent submitted that the sentence imposed upon the Petitioner herein was appropriate and that he had not demonstrated grounds to warrant this court's interference with the sentence.
19. The powers of review of the High Court are set out under Article 165 (6) and (7) of *the Constitution* of Kenya, 2010 and Section 362 of the Criminal Procedure Code. Article 165 (6) and (7) states that:-
 6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
20. Section 362 of the Criminal Procedure Code provides that:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.” (Emphasis court)
21. Notably, as both parties alluded to the fact that the Petitioner's second appeal in HCCRA No 166 of 2016 was dismissed and his conviction and sentence upheld, this court could therefore not sit on review of the Court of Appeal's decision as the said Court was superior to it.
22. Article 50(2) (q) of *the Constitution* of Kenya provides for appeal or review in accordance with the law. It states that:

“Every accused person has a right to fair trial, which includes the right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
23. The law did not envisage a situation where the High Court could sit on appeal of its own decision or review of the decision of the Court of Appeal. Therefore, this court only had the power to review the orders of the subordinate court in exercise of its supervisory powers. The Petitioner may be justly aggrieved but this court was the wrong forum for this application.



24. In view of the fact that the life sentence was indeterminate, his prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was inapplicable herein.

Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's undated Petition filed on October 17, 2023 was not merited and the same be and is hereby dismissed.

26. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE

