



**Ndiang'ngu alias Doctor Pastor v Republic (Petition E016 of 2023)
[2025] KEHC 81 (KLR) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 81 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION E016 OF 2023
SC CHIRCHIR, J
JANUARY 16, 2025**

**IN THE MATTER OF ARTICLE 28,29(D)(F), 165 (3) (A)(B),2(1),(5),20(1),(2)(3) & 27(1),(2),
(3)(4) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF SECTION
216& 329 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA AND IN
THE MATTER OF SECTION 296 (2) OF THE PENAL CODE CAP 63 LAWS OF KENYA**

BETWEEN

JACKSON OSIAKO NDIANG'NGU ALIAS DOCTOR PASTOR PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein seeks for review of sentence. He prays that the life sentence, he currently serves be reduced to a term sentence; that the court considers his mitigation, and that he has since reformed. He invokes the provisions of Article 50(1) of *the constitution*. He argues that pursuant to Article 165(3)(a) (b) of *the constitution*, this court is clothed with the jurisdiction to grant the orders sought.
2. He further prays that the court considers the time he has served while in custody in terms of section 333(2) of the criminal procedure code.
3. He contends that death sentence is arbitrary and disproportionate to the crime, and violates his rights under Article 22(1) and 50(2) (p) of *the constitution*.

Submissions

4. In his submissions, he states that he was convicted to suffer death following his conviction on a charge of robbery with violence; that his appeals to the high court and the court of Appeal were both dismissed. Later on, the sentence was commuted to life sentence by the president.



5. He urges this court to consider resentencing him upon consideration of Articles 22(1),23,25 (c), 27(1) and (2) of *the constitution*. He argues that a sentence that makes mitigation valueless is unjustifiable, discriminatory, unfair and repugnant to equity. He further submits that an indeterminate sentence is inhuman and violates the right to dignity under Article 28 of *the constitution*.
6. The petitioner has relied on a number of Authorities where the courts have substituted life and death sentence with term sentences, which I have perused.
7. The Respondent did not file any response to the petition.

Analysis and determination

8. The petitioner herein was convicted with the offence of robbery with violence and sentenced to death. By his own admission the sentence was later commuted to life imprisonment by the president. In effect, the petitioner is no longer under death sentence but a life imprisonment, pursuant to presidential intervention.
9. The imperative question which this court need to address is whether the court has the powers to interfere with a sentence which effectively was “meted out”, by the president.
10. The president’s power to commute sentences is exercisable under the power of mercy founded on Article 133 of *the constitution*. Under the Article 133(1)(c), the President has powers to, inter alia, substitute a given sentence with a less severe form of punishment.
11. In the exercise of powers under Article 133, the president acts upon the advice of the Advisory committee on the power of mercy established under clause 2 of Article 133 of *the constitution*. This is therefore an executive function, exercised by the president, once the judicial process has been exhausted.
12. In trying to answer the question as to whether courts should intervene where the president has exercised powers bestowed on him by Article 133 of *the Constitution*, 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 the way to do that would be by way of judicial review, in any event.
13. In *Pascal versus republic (2022) KEHC 13197 (KLR)*, the Judge 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 a review of such a sentence”.
14. The same position was taken in the case of *Peter Kipkosgei versus Republic (2022) eKLR*, where Justice Ochieng held “ the functions exercisable by the President under Article 133 cannot be usurped by the courts”.
15. In *Masake versus Republic (2023) KEHC 662 (KLR)* the High Court stated: “.....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*”.
16. I take the view expressed in *Athmani’s case (supra)*. I have noted for instance that under clause 4 of Article 133 of *the constitution*, the Advisory committee may consider the views of the victims of the crime, in respect of which, it is considering making recommendation to the president. In exercising that function, the committee like all Administrative bodies, are subject to supervision of the courts by way of judicial review.



17. Thus , unless the Petitioner is challenging the process adopted by the Advisory on the power of mercy committee , the court has no jurisdiction to challenge the merit of the decision made by the president pursuant to Article 133 of *the constitution*.
18. In view of the foregoing , it is my finding that this court has no jurisdiction to entertain this petition. It is hereby struck off.
19. Right of Appeal: 14 days

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant.

Jackson Makokha- Petitioner

Ms. Kagai for the Respondent

