



**Mbithi v Republic (Constitutional Petition E017 of 2023)  
[2024] KEHC 947 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 947 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION E017 OF 2023**

**LM NJUGUNA, J**

**FEBRUARY 7, 2024**

**IN THE MATTER OF CRIMINAL CASE NO. 13 OF 2009 AT EMBU HIGH COURT, CRIMINAL APPEAL NO. 360 OF 2012 AT THE COURT OF APPEAL IN NYERI AND SENTENCE REVIEW NO. 35 OF 2019 AT EMBU HIGH COURT  
IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 22(1), 25(D), 27(3) AND 165(3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF MITIGATION FROM THE ORIGINAL CASE NO. 13 OF 2009 AT EMBU HIGH COURT**

**BETWEEN**

**DANIEL LUCAS KIVUVA MBITHI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner has filed petition dated 30<sup>th</sup> October, 2023 seeking the following orders:
  - a. That the petition is allowed;
  - b. That this honourable court order that the sentence commences from the date of arrest; and
  - c. That this honourable court be pleased to give any other orders as it deems fit and just in the circumstances.
2. The petitioner was charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. He was convicted and sentenced to 30 years imprisonment. In his petition, the petitioner stated that he was arrested in the year 2009 and was in custody until 2012 when



he was sentenced to 30 years imprisonment. That he appealed against the conviction and the sentence to the Court of Appeal sitting in Nyeri where the decision of the trial court was upheld and he has so far spent 14 years in custody since he was arrested. He stated that he moved this court vide revision case number 35 of 2019 seeking review of the sentence but the application was dismissed on the grounds that the same was an appeal in disguise.

3. He stated that he is remorseful for his actions which caused the death of a person and that this court should consider reducing his sentence. That he is now 74 years old and is suffering from illnesses associated with old-age and he seeks a reduced sentence or a non-custodial sentence. That throughout the time he has been in custody, he has reformed through spiritual reformation courses like theology and he is a better individual. He urged the court to also consider the contribution he made to the community as a trained professional gynecologist and the contribution he is making as a tutor in the prison's secondary school where he is teaching biology.
4. The respondent filed grounds of opposition stating that the sentence imposed on the petitioner was not the mandatory minimum prescribed under section 204 of the *Penal Code* and that the findings of the various courts should not be disturbed. That in the revision determined by this court, it was held that the court of appeal had already dealt with the issues of the sentence exhaustively and that the same cannot be revisited through this petition.
5. The court directed the parties herein to file their written submissions and both of them complied.
6. The petitioner, in his submissions, stated that the officer in charge of the Embu GK Prison has written a recommendation letter attesting to the appellant's reformation. That during the time when he has been in custody, he has developed illnesses due to his advanced age and has lost all his teeth. That he has also lost a lot of his property and retirement benefits to expenses arising from the court process. He stated that he served the government for 32 years as a medical practitioner and that the offence occurred after his retirement. He urged the court to consider reducing his sentence so that his dignity is restored in light of Article 28 of *the Constitution*.
7. The respondent stated that this court already determined the issue of resentencing through the previous revision where the sentence was reaffirmed. That in *Muruatetu II*, the Supreme Court was silent on what would become of cases where the sentence imposed was reaffirmed by the court of appeal. That the sentence of 30 years imprisonment meted out to the petitioner was just as the court departed from the minimum prescribed sentence. It urged the court to dismiss the petition.
8. The issue for determination herein is whether this court has jurisdiction to grant the orders sought in the petition.
9. The petitioner was sentenced to 30 years imprisonment following conviction in a murder trial in Embu Criminal Case no. 13 of 2009. Before sentencing, the court considered the mitigating factors presented by the petitioner, where he stated that he is a family man and is aged. He urged the court to consider a non-custodial sentence and that the death sentence was not the only option for the court. The trial judge noted these sentiments in her ruling during sentencing.
10. The sentence was upheld by the Court of Appeal sitting in Nyeri through Criminal Appeal No. 360 of 2012, the judges noting that the appellant did not demonstrate that the sentence was harsh and excessive or that the trial judge acted on wrong principles of law. The petitioner herein then moved this court through an undated application in Criminal Revision Number 35 of 2019 seeking reduction of the sentence. The revision was dismissed, the court stating that the Court of Appeal exhaustively determined the issue of sentence and that the revision is procedurally wrong.



11. In Criminal Revision Number 35 of 2019, the petitioner sought the same orders as the ones sought herein. In the ruling dated 07<sup>th</sup> April 2020, the court dismissed the same, thus determining the issue. In my view, the court still holds the same opinion as the findings therein are of this very court, being differently constituted. This court rightly held that it could not determine a matter that had already been determined by a court higher than itself. Meanwhile, the Court of Appeal's decision still stands and the sentence was upheld, the judges therein not finding a reason to disturb the findings of this court at trial.
12. I shall go no further in this discussion because if I attempt to determine the petition herein, I proceed without jurisdiction and my determination will in fact amount to an illegality. This court lacks jurisdiction to entertain the petition, the issues having been exhaustively determined vide ruling dated 07<sup>th</sup> April 2020.
13. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 07<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Petitioner

.....for the State

