



Okombo v Republic (Petition E047 of 2021) [2023] KEHC 2885 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION E047 OF 2021
RE ABURILI, J
MARCH 24, 2023**

BETWEEN

BENARD WERE OKOMBO PETITIONER

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No 36 of 2009 in the High Court at Kisumu delivered on 27th April 2017)

RULING

1. The Petition herein Benard Were Okombo filed this Petition for resentencing on August 18, 2021. He was convicted and sentenced to suffer death for the offence of murder. He now seeks for resentencing following the Supreme Court pronouncement in *Francis Karioko Muruatetu & Another vs Republic (2017) eKLR* that the mandatory nature of the death sentence for murder convicts was unconstitutional for depriving a convict the right to mitigate and the trial court discretion in sentencing.
2. The Petitioner also filed his submissions in support of his Petition on August 31, 2022. However, this Petition has not been heard and determined owing to what the court of Appeal confirmed on December 20, 2021 that the Petitioner has a pending appeal No Criminal Appeal No 247 of 2018 in the Court of appeal at Kisumu.
3. Following that, the Petitioner was advised to withdraw his appeal if he was to be allowed to pursue his petition for resentencing. He subsequently wrote a letter to the Court of Appeal on April 7, 2022 seeking to withdraw the said appeal but quoted a wrong Appeal file No 249 of 2018 yet the Court of Appeal Deputy Registrar wrote to this court citing Criminal Appeal 247 of 2018.
4. This court cannot resentence the Petitioner when his appeal at the Court of Appeal is still pending. There is no reason why the Petitioner sought to withdraw a wrong appeal. In my view, the Petitioner wants to have his cake and eat it.



5. I find this petition for resentencing prematurely filed. It is hereby dismissed. The Petitioner can refile his petition afresh after the withdraw of his appeal.
6. This Ruling and signal to be typed and issued forthwith. File closed.

Dated, Signed and Delivered at Kisumu this 24th Day of March, 2023

R. E. ABURILI

JUDGE

