



**Kiama & another v Republic (Criminal Appeal 27 of 2016)
[2021] KECA 80 (KLR) (22 October 2021) (Order)**

Neutral citation: [2021] KECA 80 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 27 OF 2016
RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA
OCTOBER 22, 2021**

BETWEEN

JOHNSON MWANGI KIAMA 1ST APPELLANT

STEPHEN MWENDWA KALOKI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya (M. Mbogholi & L. A. Achode, JJ.) dated 8th July, 2014 in Nairobi HCCRA No. 2 of 2013)

ORDER

- 1 On 6th October, 2021, the appeal herein was placed before us for hearing. It was fully canvassed by learned counsel, Mr. Marube for the 1st appellant, Dr. Khaminwa for the 2nd appellant and Solomon Njeru for the State through written submissions orally highlighted by the respective learned senior and counsel appearing for the respective appellants herein and oral submissions by Mr. Njeru for the State in the presence of the appellants.
- 2 At the conclusion of the trial, the court reserved the judgment for delivery on 17th December, 2021.
- 3 It however transpired that before the court rose, appellants raised up their hands and upon the court inquiring from them as to what was the matter is when they separately made representations to court that led to the court issuing directions for inquiry into the veracity of the matters appellants had raised with the court resulting in the court issuing an order of the same date and which we find prudent to reproduce herein as hereunder:

“ORDER OF THE COURT



The appeal came before us today for hearing. When called out, learned counsel Mr. Marube was in attendance for the 1st appellant Dr. Khaminwa appeared for the 2nd appellant while Mr. Solomon Njeru, the learned Senior Public Prosecution Counsel (SPPC) appeared for the State.

The appeal was canvassed virtually via the Go-To-Meeting platform in the presence of learned counsel for the respective parties and the appellants, through written submissions orally highlighted by counsel for the appellants while the State adopted their written submissions filed before the High Court which were also orally highlighted. At the conclusion of the hearing, we reserved the judgment for delivery on 17th December, 2021.

However, before rising, appellant's raised their hands and upon the court inquiring from them as to what the matter was, both confirmed that they have already been resented by Kibera Law Courts with regard to the same conviction giving rise to the appeal we have just concluded hearing. Although Dr. Khaminwa has urged us to ignore that information and proceed to render ourselves on the appeal just heard, we find it prudent to verify the veracity of the said information because it is our view that if that information is correct as put by the appellants then that will render the just concluded hearing an exercise in futility as the appeal would have been compromised by the said alluded to proceedings and in essence warrants it deemed as having been overtaken by events.

We therefore make orders as follows:

1. The judgment reserved for delivery on 17th December, 2021 is arrested pending confirmation of the veracity of matters raised above by the appellants.
2. The Deputy Registrar is directed to verify the correctness of the above information either through the officer in charge Kamiti Maximum Prison or through Kibera Law Courts.
3. The Deputy Registrar to treat the matter as extremely urgent.
4. The court reserves the right to make appropriate orders upon verification of the correctness of the above information.

Made at Nairobi this 6th day of October, 2021.

- 4 Pursuant to the directions given to the Deputy Registrar in the above order, the Deputy Registrar has caused the resentencing proceedings undertaken in the Chief Magistrate's Court at Kibera and which we find prudent to reproduce herein in whole as hereunder:

“REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KIBERA

MISC CASE NUMBER 50 OF 2019

From original convictions and sentences in Criminal Case No. 1894 of 2012 at Chief Magistrate's Court Kibera

STEPHEN MWENDA KALOKI1ST APPLICANT

JOHNSON MWANGI KIAMA2ND APPLICANT



VERSUS

REPUBLICODPP

15/7/2019

Before : Hon. Mutuku (SRM)

C/Prosecutor: C/P Okallo

C/Assistant : Loyerer

Accused : Both present

Interpretation : English/Kiswahili

SENTENCE

I have considered the mitigation by the accused person as well as the presentencing reports herein dated 15th July, 2019.

I have also perused the evidence on record and the circumstances for the offence which I find serious calling for a deterrent sentence.

I therefore proceed to resentence each accused person to 20 years' imprisonment on the main charge commencing from the date of conviction herein. Right of appeal 14 days.

Ruling delivered:

In the presence of both accused

Before F. Mutuku SRM

Prosecution; Mr. E. Gitonga

Court assistant: Mr. Loyerer

HON. F. MUTUKU (SRM)

16/7/2019

Accused 1: I pray for a copy of the resentence

Accused 2: I pray to be supplied with a copy of the re-sentence

Court: Accused person to be supplied with typed copy of the re-sentence.

HON. F. MUTUKU (SRM)

16/7/2019"

5 In light of the above, it is our position that the hearing of the appeal was not only an exercise in futility but also null and void and of no consequence having been overtaken by events as at the time the futile hearing exercise was undertaken.

6 We therefore proceed to make orders thereon as follows:

1. The order reserving judgment for delivery on 17th December, 2021 arising from the purported hearing of the appeal conducted on 6th October, 2021 be and is hereby recalled and set aside.



2. The respective parties to the appeal are restored ante to the position they were in before the purported hearing of the appeal commenced on 6th October, 2021.
3. The appeal is also restored ante to the position it was in before the commencement of its purported hearing.
4. In light of the contents of the proceedings of what transpired before the Chief Magistrate's Court at Kibera (Hon. F. M. Mutuku, SRM) on 16th July, 2019, the appeal herein be and is hereby marked as withdrawn under Rule 68(1) of the *Court of Appeal Rules*.

MADE AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a

True copy of the original

Signed

DEPUTY REGISTRAR

