



REPUBLIC OF KENYA



**Omulama v Republic (Criminal Petition 1 of 2024)
[2025] KEHC 651 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION 1 OF 2024
JN KAMAU, J
JANUARY 30, 2025**

BETWEEN

ELISHA MAIYA OMULAMA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein together with his Co-Accused were jointly charged and tried on two (2) Counts. Count I was for the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). Count II was for the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. These offences occurred on 20th December 2012.
2. On 20th December 2013, the Learned Trial Magistrate, Hon Susan N. Mwangi, Ag Senior Resident Magistrate convicted both him and his Co-Accused for both offences in Vihiga Criminal Case No 503 of 2012 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba. She sentenced them to death for the offence of robbery with violence and put the sentence for rape in abeyance.
3. Being dissatisfied with the said decision, the Petitioner herein lodged an appeal in Kakamega HCCRA No 1 of 2014 whereby Majanja J (as he then was) affirmed his conviction and sentence for the offence of robbery with violence. He noted that the Trial Court did not pronounce itself on the sentence for the offence of rape. He therefore sentenced him and his Co-Accused to twenty (20) years for the offence of gang rape and held the same in abeyance in view of the death sentence.
4. Being dissatisfied with the first appellate court's decision, on 6th November 2017, the Petitioner herein lodged a Notice of Appeal indicating his intention to file a second appeal at the Court of Appeal. It was not clear from the proceedings before this court if he had appealed to the Court of Appeal. However,



in his Written Submissions that were filed on 1st October 2019, he had indicated that he no longer wished to pursue the appeal at the Court of Appeal, Kisumu.

5. The Petitioner's undated Written Submissions were filed on 1st October 2019. He also filed additional undated Written Submissions on 17th November 2021. Despite the Respondent having been given an opportunity to file its Written Submissions on 1st October 2024 by 31st October 2024, it did not comply with the court's directions. This court checked the e-filing portal and did not see any Written Submissions. The Judgement herein is therefore based on the Petitioner's Written Submissions only that he relied upon in their entirety.

Legal Analysis

6. In the present Notice of Motion application dated and filed on 12th September 2018, he sought a review of the death sentence and he relied on the Supreme Court decision which he stated found the mandatory death sentence under Section 204 of the Penal Code to have been unconstitutional. He had also sought that he be given determinate sentences in Vihiga Criminal Case No 503 of 2012 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba and Vihiga Criminal Case No 544 of 2012 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba which should run concurrently.
7. He also sought that the period that he had spent in custody while his trial was ongoing be taken into account while computing his sentence as provided under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
8. He further contended that this court had power to correct mistakes under Article 163 of *the Constitution* of Kenya to advance the law as provided under Articles 20,21, 23 and 259 of *the Constitution* of Kenya which provided every provision of *the Constitution* of Kenya had to be construed according to the doctrine of interpretation.
9. He pointed out that he had been rehabilitated and had not had any disciplinary issues while in prison. He also stated that he had undergone training in life support skills and obtained Certificates in Light and Lamp Kenya and for Gospel Faith Ministry.
10. He therefore asked this court to direct that the life sentences be substituted to a term of years and then allow the said sentences run concurrently from the date of his arrest as provided in Article 50(2) of *the Constitution* of Kenya and Section 329.
11. He also sought that the period that he had spent in custody while his trial was ongoing be taken into account while computing his sentence as provided under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). He relied on the case of Ahamed Abolfadhi Mohammed & Another vs Republic [2018] eKLR in this regard.

Legal Analysis

12. Right from the onset, this court noted that it was evident from the grounds on the face of the said application that the Petitioner's death sentence was commuted to life imprisonment. Although he had indicated that he had a pending appeal at the Court of Appeal which he wished to withdraw, he had not indicated the case number. He did not present to this court a Notice of Withdrawal filed at the Court of Appeal in Kisumu to show that he had indeed withdrawn his second appeal.
13. As there was danger of this court giving a different decision from that of the Court of Appeal, which was superior to it, the most prudent thing would have been for him to have first withdrawn the said Appeal before this court could proceed to hear and determine the Petition herein.



14. Be that as it may, this court did due diligence by going through the Kenya Law Reports website and noted that the Petitioner and his Co-Accused were convicted of the offence on robbery with violence in Vihiga Criminal Case No 544 of 2013 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba. Sitati and Mrima JJ upheld the conviction and sentence of the Trial Court in Kakamega HCCRA No 52 of 2014. In Criminal Appeal No 117 of 2017 Anemba & another v Republic (Criminal Appeal 117 of 2017) [2023] KECA 339 (KLR) (17 March 2023) (Judgment), the Court of Appeal Kisumu further upheld the conviction and sentence of Sitati and Mrima JJ. There were material non-disclosure by the Petitioner herein.
15. Notably, in its decision of 17th March 2023, the Court of Appeal rendered itself on the Ruling of the Supreme Court in the Francis Karioko Muruatetu case when it rendered itself as follows:-

“The Prosecution Counsel opposed this ground and fittingly pointed out that the Supreme Court in Muruatetu 2 was clear on the non-application of Muruatetu 1 to robbery with violence.”
16. The Petition herein related to Vihiga Criminal Case No 544 of 2013 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba where the Court of Appeal had rendered its decision. In view of the hierarchical system of Kenyan courts, this court could not review a decision of a court which was above it. It could not therefore substitute the life sentences the Petitioner was currently serving and give a determinate sentence in the cases emanating from Vihiga Criminal Case No 503 of 2013 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba and Vihiga Criminal Case No 544 of 2013 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba.
17. In addition, in its decision in Omulama & another v Republic (Criminal Appeal 137 of 2015) [2023] KECA 43 (KLR) (3 February 2023) (Judgment) in which upheld Majanja J’s decision in Vihiga Criminal Case No 503 of 2013 Republic vs Elisha Maiya Omulama & Charles Amboko Anemba, the Court of Appeal stated as follows:-

“The death sentence remains in our books as a possible sentence for the offence of robbery with violence. The circumstances of this case are aggravated and the death sentence does not deserve review from us.”
18. The Court of Appeal had already pronounced itself on the non-applicability of the case of Francis Karioko Muruatetu in Anemba & another v Republic (Criminal Appeal 117 of 2017) [2023] KECA 339 (KLR) (17 March 2023) (Judgment) and upheld the death sentence in Omulama & another v Republic (Criminal Appeal 137 of 2015) [2023] KECA 43 (KLR) (3 February 2023) (Judgment).
19. This court could not therefore review the sentences that had been upheld by the Court of Appeal. Substitution of the life sentence herein with a determinate sentence would, in any event, be purely an academic exercise. Indeed, a determinate sentence could only be held in abeyance in view of the death sentences that were subsisting against the Appellant herein.
20. The above notwithstanding, in the event that there was no death sentence or indeterminate sentence that was imposed on the Petitioner herein, this court could still not have directed that the determinate sentences run concurrently as the different sentences were meted out by different courts for offences that occurred on different dates.



21. Notably, Section 14(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) states that:-

“Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose;

and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”

22. The question of Section 333(2) of the Criminal Procedure Code which mandated that the period an accused person had remained in custody while his trial was ongoing be considered was therefore rendered moot. The Petitioner was currently serving a life sentence that was indeterminate and hence no period could be deducted from the sentence that he was currently serving.

Disposition

23. For the foregoing reasons, the upshot of this court’s decision was that the Petitioner’s undated Petition that was lodged on 12th September 2018 was not merited and the same be and is hereby dismissed.

24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JANUARY 2025

J. KAMAU

JUDGE

