



**Imbongo v Director of Public Prosecution (Criminal Revision  
E002 of 2024) [2025] KEHC 610 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL REVISION E002 OF 2024  
S MBUNGI, J  
JANUARY 28, 2025**

**BETWEEN**

**GERISHOM PHILIP IMBONGO ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant herein, was charged, tried, convicted and sentenced to death for the offence of robbery with violence in Butali Criminal Case No 1074 of 2010.
2. Dissatisfied with the conviction and the sentence of the trial court, the Applicant lodged an appeal on both conviction and sentence in the High court at Kakamega being Criminal Appeal No 49 of 2011 which appeal was dismissed in its entirety. The applicant then moved to the court of appeal vide Appeal No 41 of 2013 and the appeal was dismissed on conviction and sentence upheld.
3. The Applicant has now approached this court through a Notice of Motion Application for revision brought under the provisions of Articles 22(1), 23(1), 25(c), 14(10) (4), 50(2)(p)(q), 159(2) and 165(3) of the *Constitution* of Kenya, section 362 and 333(2) of the *Criminal Procedure Code* and section 296(2) of the *Penal Code* seeking revision of the death sentence imposed on him.
4. The applicant has cited article (50(2) (p)& (q) of the *Constitution* provides as follows:-

“ 50(2) Every accused person has the right to a fair trial, which includes the right—

- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and



(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

5. The application before this court also invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law.

6. The above is the import of Section 362 as read with Section 364 of the [Criminal Procedure Code](#) which provides as follows: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

7. Supreme Court considered the issue of review of judgements and orders in [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- a. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- b. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- c. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- d. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

8. I have looked at the submissions by the applicant. He has raised tenable issues of law regarding the cruelty of the sentence meted by the trial court and its unconstitutionality.

9. In [Republic v Karisa Chengo & 2 others](#) [2017] eKLR, the Supreme Court further emphasized that courts must adhere to the jurisdictional limits prescribed by law and cannot entertain matters already conclusively decided unless a substantial issue of law arises. The Court held that revisionary jurisdiction cannot be invoked to re-open or review concluded appeals unless constitutional violations are evident. The court held thus:

“In addition to the above, the prospectivity or retrospectivity of judicial decisions is also a subject already considered by Courts and the common thread running through local and comparative jurisprudence is that, generally, judicial pronouncements are to have prospective application. For instance, in *A. v The Governor of Arbour Hill Prison* [2006]



IESC 45; [2006] 4 IR88, the applicant was convicted of an offence under a statutory provision that was, in a subsequent case held to be unconstitutional. On the basis that unconstitutionality in that regard must be viewed backwards in time, the applicant moved the Court, praying for release from custody. Geoghegan, J. in addressing that issue remarked as follows:

“I am of the view that concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened... I am prepared to accept that there may possibly be exceptions. But in general it cannot be done... I am also firmly of the opinion that if the law were otherwise, there would be a grave danger that Judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which... should not happen.”

In the same case, Murray, CJ, expressed the same concern thus:

“In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society.”

10. This Court notes that the applicant is seeking review of a death sentence. Ideally, the court has no jurisdiction to do so, as there has been a previous decision from this court as well as the Court of Appeal. However, the court (as held in paragraph 7) has powers to listen to a petition outlining the unconstitutionality of a sentence. The applicant should file a petition and not a revision application to address the issues of law he has raised.
11. In *Mwangi v Republic* (Criminal Revision E018 of 2024) [2024] KEHC 12975 (KLR) (16 October 2024), it was observed that courts may not revise a sentence when the matter has been conclusively determined by a higher court unless the applicant raises constitutional issues that were not previously addressed. This aligns with the constitutional mandate of protecting rights while respecting judicial hierarchy.
12. Additionally, in *William Okungu Kittiny v Republic* [2018] eKLR, the Court of Appeal underscored that where an applicant alleges unconstitutionality of a sentence, such matters should be raised through a constitutional petition rather than through revision applications. The court held as follows:

“By paragraph 111 of the judgment, the Supreme Court allowed sentence re-hearing only for the two petitioners in the matter before it and said:

“In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence which is similar to that of the petitioners in this case.” .....

...The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the *Constitution*, the decision of the Supreme Court has



immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases....”

13. Accordingly, this application is dismissed. The applicant is advised to file a petition raising the unconstitutionality of the death sentence if he so desires, for consideration by this court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JANUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Accused person – present

Court Prosecutor – Sirtuy

Court Assistant – Elizabeth Angong’a

