



REPUBLIC OF KENYA



**Shitambachi v Republic- (Petition E008 of 2022)
[2024] KEHC 2901 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION E008 OF 2022
SC CHIRCHIR, J
MARCH 20, 2024**

**IN THE MATTER OF PROTECTION OF THE BILL OF RIGHTS IN THE CONSTITUTION
AND
IN THE MATTER OF ARTICLES 22(1), 23,333(2),165(3),47 ,50 (1) OF THE CONSTITUTION**

BETWEEN

JOSPHAT LUMUNZI SHITAMBACHI APPLICANT

AND

REPUBLIC- RESPONDENT

JUDGMENT

1. By way of a Notice of motion application the applicant seeks for the following orders
 - a. That the honourable court be pleased to grant him the period he spent in remand to be included to the sentence he is serving.
 - b. That, the honourable high court be pleased to reduce the sentence he is serving which is 25 years to a lesser sentence.
 - c. That further grounds be found in the annexed sworn affidavit and subsequent written and oral submission.
2. His grounds for review are as follows;
 - a. He is currently serving a 25 year imprisonment sentence in High court criminal case no 46 of 2010 for the offence of murder contrary to section 203 as read with section 204 of the [penal code](#) which is to end on 26/06/2023.
 - b. That this honourable court include the 5 years he had already spent in remand to be considered in his sentence.



- c. That the honourable court be pleased to reduce the sentence he is serving.
 - d. That he had undergone a vocational and industrious training as means of rehabilitation while in prison and suitable for reduction of sentence.
 - e. That more grounds to be adduced in his annexed affidavit and written submissions.
3. He avers that he is a first offender and is remorseful and has been in remand since the time he was arrested until the time of conviction.
 4. He asserts that the trial magistrate failed to direct that the 8 – years sentence effect from the time of his arrest.
 5. He prays that this court exercise its discretion according to the ruling in the Machakos High court petition no 17/21 Philip Mueke and others.
 6. The applicant proceeded by way of oral submission on 14th December 2023.
 7. In his submission the appellant avers that he had been convicted and sentenced to suffer death on 25th May 2015 at kakamega High court by Hon. Ruth Sitati . He appealed at the court of Appeal, at Kisumu ,and the court substituted the sentence with 25 years imprisonment.
 8. He states that he has already served 12 years in prison; he has reformed and rehabilitated and prays that the court be lenient and reduce his sentence further.
 9. He avers that while in prison he has joined the various rehabilitation programmes such as bible school studies, which he has completed.
 10. The appellant claim that the 25 years imprisonment is excessive, harsh and does not meet the main objective of sentencing .
 11. He further submits that he was arrested aged 48 years and is currently 60 years old, he is a first time offender and these factors should have been reflected in the sentence. He relied in the case of *Hezekiah Mwaura Kibe vs. Republic* (1976) KLR 115 in this regard.
 12. He prays that the court considered the time he had served while in remand as stated in section 333 (2) of the criminal procedure code claiming that he was arrested on 17/11/2010.
 13. He prays that the court apply principle of Article 27 (1) (2) (4) and article 159 (2) of the constitution so that he can enjoy the benefit of the law.
 14. The petition is opposed.
 15. It is the Respondent submission that the sentence is not excessive in the circumstances and was commensurate to the offence.
 16. The Respondent argues that although the trial court did not expressly state that it had factored the time spent in custody, the petitioner is serving a sentence of 25 years in a charge that carries death sentence and therefore the sentence is not excessive.
 17. They assert that the fact that the appellant has undergone a vocational and industrious training is not sufficient grounds to interfere with the sentence meted out on the court’s discretion.

Determination

18. The only issue for determination is whether this court should review the sentence.



19. The record shows that the petitioner herein was sentenced to death by Hon. Ruth Sitati *vide* a Judgment that was delivered on 26th October 2015 in Kakamega High court Criminal case No. 46 of 2010 .
20. The appellant being aggrieved by the conviction and the sentence moved to the court of appeal. The court of Appeal in a judgment delivered on 23rd July 2021 substituted the death penalty with 25 years.
21. As such, it is clear that the Applicant herein is currently serving a sentence meted out by the court of appeal. The Appellant is asking this court to review the decision of the court of Appeal.
22. The pertinent question is whether this court has jurisdiction to review a sentence passed by the court of Appeal.
23. The supreme court in *Kenya Hotel Properties Limited v Attorney General & 5 others* (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) held as follows on the same; “. Similarly, the Court of Appeal in agreeing with the High Court, noted the absurdity of asking a High Court to purportedly re-open a decision of the Court of Appeal, noting that no such jurisdiction exists by holding: “Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the *constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of article 165(6) is supervise superior courts. Moreover, under article 164(3) of the *constitution*, this court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this court to quash or annul them, or that it could purport to direct this court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant’s submission that the issue pits supremacy of the courts against citizens’ enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere.”
24. The Applicant has styled his Application as a petition, but that notwithstanding the net effect is that this would be tantamount to revising the Judgment of the court of Appeal .
25. It is important to point out that the 25 year sentence was meted out by the court of Appeal, not this court. The powers of revision given to the high court under Article 165 (6) is limited to supervising the subordinate courts not superior courts. The plea for consideration of the time served should have been raised at the court of Appeal, at the time the Applicant was prosecuting his Appeal.
26. In short this court has no jurisdiction to grant the orders being sought. The petition is hereby struck off.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2024.

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant.



No appearance by the parties.

