



**Okwemba v Republic (Criminal Petition E002B of 2023)  
[2024] KEHC 7807 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7807 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL PETITION E002B OF 2023**

**JN KAMAU, J**

**JUNE 27, 2024**

**BETWEEN**

**ABSALOM OKWEMBA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) by Sitati J (as she then was). She sentenced him to death.
2. On 28<sup>th</sup> April 2023, he filed the Petition for review of the sentence herein. In the Affidavit that he swore in support thereof, he stated that based on the Supreme Court Ruling that was made on 19<sup>th</sup> December 2017, the mandatory death sentence that was meted on him was unconstitutional, inhumane and degrading.
3. His Written Submissions were dated 17<sup>th</sup> November 2023 and filed on 22<sup>nd</sup> November 2023. The Respondent did not file any Written Submissions. The Judgment herein is therefore based on the Petitioner's Written Submissions only.

**Legal Analysis**

4. The Petitioner submitted that he was not accorded a fair trial for the reason that the death sentence imposed on him contravened Articles 25 (c), 27(1)(2), 28, 29, 50(2)(p) of the [Constitution](#) of Kenya 2010. He sought for the least severe sentence pursuant to Article 50(2)(p) of the [Constitution](#) and Section 26(2) of the [Penal Code](#) Cap 63 (Laws of Kenya).
5. He pointed out that the death sentence had been commuted to life imprisonment by President H. E William Samoei Ruto in 2023. He was emphatic that in the case of [Francis Karioko Muruatetu &](#)



- Another vs Republic* [2017] eKLR, the Supreme Court declared that mandatory death sentence was unconstitutional.
6. He also pleaded with court to consider the period he had spent in custody since his arrest on 20<sup>th</sup> June 2011 in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) as was held in the case of *Edwin Otieno Odhiambo vs Republic* [2009] eKLR and *Amed (sic) Abolifath Mobammed and Sayed Mansour Mousavi vs Republic* [2018] eKLR.
  7. He asserted that he was only twenty-eight (28) years old when he was arrested and was currently forty-one (41) years old. It was his further submission that he was the sole breadwinner of his family and that he had been reformed and rehabilitated as he had undergone Bible Course Studies (Theology) and attained Certificate in Emmaus Bible School, Diploma in Emmaus Bible School and Discipleship Certificate on training, growing and maturing in Christ.
  8. In addition, he asserted that he had maintained discipline and good character during his incarceration and was remorseful of the events that led to the offence. He prayed that this court considers the twelve (12) years he had spent in custody as retribution. In that regard, he relied on the cases of *Loyatum vs Republic* [2018] eKLR and *Bonface Owino Oloo vs Republic* [2022] eKLR wherein the courts treated the time the petitioners had spent in custody as sufficient retribution to the commission of the offences and released them.
  9. On 6<sup>th</sup> July 2021, the Supreme Court gave guidelines in the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR to the effect that the said decision applied to sentences of murder under Sections 203 and 204 of the *Penal Code*.
  10. Bearing in mind the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) and The *Sentencing Policy Guidelines*, 2016 of the Judiciary, this court was satisfied that this was a suitable case for it to exercise its discretion to review the death sentence as he was convicted well before the aforesaid decision.
  11. In the case of *William Obondo Ochola vs Republic* [2021] eKLR, this very court found and held that the commutation of the death sentence to life imprisonment by the President in 2016 was an executive order and was not a judicial function.
  12. It was the considered view of this court that the Petitioner herein was thus entitled to the benefit of re-sentencing by this court as failure to review his sentence would be discriminatory and contrary to the provisions of Article 27(4) of the *Constitution* of Kenya, 2010 that prohibits any form of discrimination.
  13. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The *Sentencing Policy Guidelines* in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
  14. It was important that the sentence communicate to the community, condemnation of the criminal act by the offender. The sentence would indirectly send a strong signal to him and other would be offenders from committing such an offence.
  15. The sentence also had to one that was hinged on retributive justice for the secondary victims. Indeed, justice must not only be done for the deceased's family but it must also be seen to be done.



16. Be that as it may, while there was need to send a strong message to the society that violence against other persons was strongly condemned, convicts who had reformed and were remorseful ought to be given a second chance and have a new lease of life where appropriate.
17. Notably, the Petitioner herein killed Shadrack Ondeko (hereinafter referred to as “the deceased”) on an allegation of having stolen his vegetables. The deceased suffered greatly before he died. The post-mortem showed that he had fractured limbs, two (2) ribs and a dislocation of the cervical neck. The murder could only have been said to have been gruesome. It was so pre-meditated and malicious.
18. Having said so, the Petitioner herein had already spent about twelve (12) years behind bars. He had obviously had sufficient time to reflect on his actions.
19. Taking all the factors into consideration, this court came to the firm view that a sentence of thirty (30) years imprisonment was fair in the circumstances of the case herein and hereby reviews the same from the death sentence.
20. Notably, Section 333 (2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) was previously inapplicable in the circumstances of the case herein as the Petitioner herein was serving a death sentence.
21. However, as the sentence of thirty (30) years this court meted upon him was now determinate, the provisions of Section 333(2) of the [Criminal Procedure Code](#) were now applicable herein.
22. The Petitioner furnished the court with a copy of the decision of Sitati J (as she then was), this court was, however, unable to pronounce itself on the merit or otherwise of the Applicant’s application under Section 333(2) of the [Criminal Procedure Code](#) as it could not determine when the Petitioner was arrested, whether or not he was granted bond and/ or the actual period of time he spent in remand during trial and when he was sentenced.  
  
The above notwithstanding, the Trial Court records had not been availed to this court as at the time of writing the Judgment herein.
23. Having said so, his prayer for the said period to be considered was not a lost cause as he could still move the court appropriately once the trial court records were traced and/or he furnished with the court with certified copies of the proceedings of the trial.

### **Disposition**

24. For the foregoing reasons, the upshot of this court’s decision was that the Petitioners’ Petition for review of the sentence that was filed on 28<sup>th</sup> April 2023 was merited and the same be and is hereby allowed. Accordingly, the court hereby upholds the conviction of the Petitioner for the offence of murder as it was safe but hereby reviews the mandatory death sentence that was imposed upon him and later commuted to life imprisonment and replaces the same with thirty (30) years imprisonment.
25. The Petitioner be and is hereby at liberty to bring a fresh application under Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) for consideration by the court once the Trial Court records are made available.
26. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF JUNE 2024**

**J. KAMAU**

**JUDGE**

