



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO E003 OF 2020

BONFACE ODUOR OMODHO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner was tried and convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was sentenced to fifteen (15) years imprisonment on 8th May 2013 when the court therein ordered that the sentence commence from the date of sentencing.
2. Being dissatisfied with the said decision, he lodged an appeal in the Court of Appeal **Criminal Appeal No 55 of 2013**. However, he did not proceed with the Appeal as he withdrew the same. An order withdrawing the said Appeal was issued on 19th October 2015.
3. On 24th September 2020, he filed an application for review of the sentence. In his affidavit that he swore in support of his application, he urged the court to consider the period he had spent in remand before his sentence, being the period from the year 2008 to 2013.
4. He submitted that he was the sole breadwinner in his family as his siblings and aged parents depended on him. He added that he had been in prison for eleven (11) years and urged the court to allow him the freedom to engage in positive development of the Nation as a Kenyan citizen. He sought for a reduction of sentence and/or a non-custodial sentence.
5. On its part, the State opposed the Petitioner's application for review of sentence on the grounds that the Petitioner had not provided evidence to show that he spent all eleven (11) years in custody, to wit from the year 2008 to 2013. Further, it argued that the Trial Court considered all mitigating factors including the time he had spent in custody.
6. It referred this court to the Supreme Court Guidelines given on 6th July 2021 in the case **Petition No 15 & 16 (Consolidated) of 2015 Francis Karioko Muruatetu and Wilson Thirimbu Mwangi vs Republic** where the Supreme Court directed that the constitutional validity of mandatory death sentence only related to murder cases.
7. It averred that to his benefit, the Petitioner, had now been rehabilitated and reformed. It added that he was an artist and had produced drawings to show his preparedness to rejoin the community.
8. It however, argued that Sections 362 and 364 of the Criminal Procedure Code were not applicable to the facts of this application since the Petitioner sought to review the decision of the High Court. In this regard, it relied on the case of **High Court of Kenya at Embu Criminal Review No 12 of 2020** (eKLR Citation not given) where the court therein held that the High Court lacked jurisdiction to revise its own orders regarding sentence. It therefore urged this court to dismiss his application and uphold his conviction and sentence.

LEGAL ANALYSIS

9. This court considered the Re-Sentencing Report by William Otieno, Probation Officer, Kisumu that was filed on 15th July 2021 and noted that he had recommended the review of the Petitioner's sentence and urged that he be considered for non-custodial sentence. However, the court could not review the sentence that was meted upon the Petitioner. This is because he was not sentenced to death but rather, he was sentenced to fifteen (15) years imprisonment. This court did not understand the State's submissions that the case of **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR** only related to murder cases as the Petitioner had been charged with murder. Suffice it to state that the said case could not assist the Petitioner as far as re-sentencing was concerned as he was not sentenced to death upon

being convicted.

10. Having said so, the more pertinent issue to this court was the period the Petitioner spent in custody, if at all, before he was convicted. Notably, Section 333(2) of the Criminal Procedure Code provides that: -

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.” (emphasis court).

11. The Court of Appeal reiterated this provision in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR**. The duty of the court in this regard is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is stipulated that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed...”

12. The above notwithstanding, Chemitei J had already pronounced himself on when the sentence ought to run. He said that this was to be from the date of his decision that he delivered on 8th May 2013. The provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) were therefore not applicable in the circumstances of the case herein as this court could not purport to review and/or vary his decision and/or sit on appeal of his decision as both his and this court were of equal and competent jurisdiction.

13. This court’s hands were tied by the pronouncement of Chemitei J of 8th May 2013 regarding when the Petitioner’s sentence was to commence. As the said Learned Judge had since left the jurisdiction of this court, the only option that was left to the Petitioner herein was for him to appeal his decision at the Court of Appeal

DISPOSITION

14. For the foregoing reasons, the upshot of this court’s decision was that the Petitioner’s application for review of the sentence that was filed on 24th September 2020 was not merited and the same be and is hereby dismissed. Accordingly, his conviction and sentence for the offence of murder be and is hereby upheld.

15. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH 2022

J. KAMAU

JUDGE