



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CRIMINAL APPLN. NO. E152 OF 2021

ERASTUS NGURA ODHIAMBO APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The applicant, *Erastus Ngura Odhiambo*, was charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of the information were that on the night of 11th/12th December 2014 at Waihura Court, Buruburu Phase Five Extension within Nairobi County, he murdered *Linda Wanjiku Irungu*.

2. Upon his conviction, the applicant was sentenced by *Mutuku J* to serve 20 years imprisonment. His appeal to the Court of Appeal against his conviction and sentence was dismissed vide a judgment delivered on 24th April 2020.

3. The court record shows that on 23rd April 2021, the applicant filed a petition to the Judicial Review Division of the High Court in which he challenged the aforesaid conviction and sentence which had been confirmed by the Court of Appeal. He sought the following declarations:

- i. That his rights to a fair trial under the constitution had been infringed;
- ii. That his imprisonment for 20 years was not the minimum sentence and that the High Court still had discretion to consider mitigating factors and consider time already served as sufficient; and
- iii. any other orders that the court may deem appropriate in the circumstances.

4. The petition was filed contemporaneously with a Notice of Motion in which the applicant sought four substantive orders which are reproduced verbatim hereunder:

- i. That the Hon. Court be pleased to review and/or reverse the decision at in sentencing the petitioner as the trial court raised concern that the petitioner did not raise defence of provocation/ manslaughter, thus shifting the burden of proof against the petitioner;*
- ii. That the Hon. Court be pleased to make a distinction between the term “liable” provided in manslaughter/provocation and “shall” stipulated in murder charge under the Penal Code and further consider mitigating factors;*
- iii. That the court be pleased to make observation that if the trial court did not shift the burden of the case against the petitioner, the prosecution would not have been deemed to have proved the charge of murder and/or manslaughter or at all;*
- iv. That the Hon. Court be pleased to nullify/reverse the sentence and make an order acquitting the petitioner, and or review the sentence.*

5. The application was supported by an affidavit sworn by the applicant in which he questioned the validity of his conviction and sentence by the High Court as well as the decision of the Court of Appeal in confirming his conviction and sentence.

6. The petition and the Notice of Motion were considered by *Nyamweya J* (as she then was) and in a ruling delivered on 26th April 2021, the Hon. Judge found that the Judicial Review Division lacked jurisdiction to review decisions of superior courts. Since the applicant had

sought resentencing relying on the Supreme Court's decision in Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR, the Hon. Judge ordered that the petition and application be transferred to the Criminal Division of the High Court for hearing and determination.

7. On 1st February 2022, the applicant withdrew his application filed on 23rd April 2021 to give way to the hearing of the petition.
8. In support of the petition, the applicant filed submissions titled "supplementary grounds" in which he specified that he was seeking review of the sentence imposed on him on HCCR. No. 115 of 2014, [2018] eKLR which had been confirmed by the Court of Appeal in Criminal Appeal No. 115 of 2018 [2020] eKLR.
9. In his submissions, the applicant urged this court to review his sentence claiming that the court had erred in sentencing him to 20 years imprisonment as this contravened *Article 50 (2) (q)* of the *Constitution* which requires that offenders be subjected to the least possible punishment. He relied on the Supreme Court's decision in Francis Karioko Muruatetu & 5 Others V Republic [supra] and restated the mitigating factors which the court should consider in determining his plea for resentencing. He also implored me to consider the time he had spent in lawful custody during the trial as required by *section 333 (2)* of the *Criminal Procedure Code*.
10. The petition is opposed by the state. Learned prosecuting counsel, *Mr. Kiragu*, filed grounds of opposition on 21st March 2022 in which he challenged the jurisdiction of this court to entertain and determine the petition. He asserted that the applicant had exhausted his remedies before this court once he filed an appeal to the Court of Appeal; that in any event, his plea in mitigation was considered by *Mutuku J* and that is why he was not sentenced to the mandatory death penalty; that the sentence imposed by the trial court was lawful and very lenient.
11. During the hearing, learned counsel for the applicant, *Mr. Owuor* reiterated the mitigating factors advanced by the applicant in his written submissions. The applicant also addressed the court and emphasized the positive steps he had undertaken while in prison including enrolling for a Master's Degree course in Business Administration. In addition, he claimed that he was fully rehabilitated and ought to be given a non custodial sentence so that he could have an opportunity to give back to society.
12. On his part, learned prosecuting counsel, *Mr. Kiragu*, relied on his grounds of opposition and urged me to find that this court lacked jurisdiction to grant the orders sought by the applicant.
13. I have considered the applicant's petition, his written and oral submissions as well as the grounds of opposition filed on behalf of the respondent and *Mr. Kiragu's* brief oral submissions.

I have also read the court record. I find that the applicant's trial for the offence of murder was conducted and concluded by this court (*Hon. Mutuku J*) post the Supreme Court's first *Muruatetu* decision. The court record clearly reveals that when sentencing the applicant, *Hon. Mutuku J* carefully considered the plea in mitigation offered by the applicant and the circumstances in which the offence was committed.

14. In her ruling on sentencing, the Hon. Judge noted that the penalty prescribed for the offence of murder was death. She however applied the Supreme Court's decision in the *Muruatetu* case which declared the mandatory death penalty prescribed in *Section 204* of the *Penal Code* unconstitutional to the extent that it deprived the trial court of its discretion to impose any other appropriate sentence after considering both the mitigating and aggravating factors in a case. Guided by the principle enunciated by the Supreme Court in the aforesaid case, the trial judge exercised her discretion and sentenced the applicant to serve 20 years imprisonment.
15. As stated earlier, the applicant's appeal to the Court of Appeal was dismissed on 24th April 2020. In dismissing the appellant's appeal against sentence, this is what the court said:

"We also hasten to add that given the violent manner in which the appellant killed the deceased, we think he was undeserving of a twenty (20) year jail term.

The appellant appears to be part of a growing number of young persons who enjoy affluence and think that human life is of no value. The deceased who was not armed was in her motor vehicle. She was pulled out of her moving car and shot at close range. This was a cold blood murder. As if it was not enough to kill her, the appellant continued to kick the lifeless body of the deceased, all an indication of malice aforethought. The circumstances depict a man who is dangerous to society and he ought to have received a more severe sentence."

16. I have reproduced the above remarks by the Court of Appeal to make the point that the sentence imposed on the applicant was very lenient considering the circumstances in which he committed the offence. It is important to note that the instant petition was filed about a year after the applicant's appeal was dismissed by the Court of Appeal. The applicant therefore filed the petition knowing fully well what the Court of Appeal had said about his sentence and knowing that in sentencing him to 20 years imprisonment instead of sentencing him to death as prescribed by the law, the trial court had applied the Supreme Court's decision in the *Muruatetu* case. In the circumstances, the filing of the instant petition was a blatant abuse of the court process.
17. Besides, *Article 162* of the *Constitution* which deals with the system and hierarchy of courts shows clearly that the Court of Appeal is superior to the High Court and Courts of Equal Status and *Article 163* proceeds to expressly state that appeals from decisions of the Court of Appeal lie to the Supreme Court as a matter of right in questions involving interpretation or application of the constitution and in any other case upon the applicant obtaining the necessary certification. This then leaves no doubt that the High Court lacks jurisdiction to hear and determine any matter that has been heard and determined on appeal by the Court of Appeal.

18. As was held by the Supreme Court in the case of Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & Another, [2012] eKLR, a court of law can only exercise jurisdiction as conferred on it by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law by means of judicial craft. In my considered

opinion, entertaining the applicant's petition would be tantamount to sitting on appeal on a decision made by the Court of Appeal which as I have said earlier is beyond this court's jurisdiction.

19. For the foregoing reasons, I wholly concur with Mr. Kiragu's submissions. It is my finding that the applicant's petition is incompetent for want of jurisdiction and it is hereby struck out.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.

C. W. GITHUA

JUDGE

In the presence of:

The Appellant

Ms Nganga holding brief for Mr. Owuor for the applicant

Ms Ntabo for the respondent

Ms Karwitha: Court Assistant