



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL PETITION NO. 58 OF 2020**

**JAMES OTIENO..... PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Petitioner, **JAMES OTIENO**, was convicted for the offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

1. By his Petition, he has asked the Court to review the sentence and to reduce it to a term that was equivalent to the period he had already served. In the alternative, the Petitioner asked that the sentence of imprisonment be reviewed so that it is substituted with a non-custodial sentence.
2. The court was invited to take into consideration the provisions of **Section 333 (2)** of the **Criminal Procedure Code**, and to deduct from the sentence that was imposed by the trial court, the period which the Petitioner had spent in custody prior to his conviction.
3. According to the Petitioner, he had been in custody for a period of six (6) months.
4. The Petitioner told this court that he was suffering from High Blood Pressure. Therefore, he feared that if he contracted the corona virus, he could easily lose his life.
5. He also said that because he had been the bread-winner for his family and his elderly parents, the family was suffering due to his incarceration.
6. The Petitioner told the court that he had suffered triple punishment, as he had lost his wife; he was now in custody; and his children had become destitute and urchins.
7. According to the Petitioner;

**“5. THAT the time limit for 10 years sentence imposed on me is ambiguous, as an offence of manslaughter can be even a warning, hours or a day. 10 years is much with this offence of manslaughter and is against my rights to dignity as enshrined under Article 28 of the Constitution.”**

8. He also reasoned that his right to a fair trial had been violated, as the trial court never gave consideration to his mitigation.
9. During the time he has spent in prison custody, the Petitioner had used the time constructively. He had taken up theological courses in Biblical Studies and he had been awarded a Certificate in Lamp and Light, Gospel Faith Messenger and Bible League.
10. In response to the Petition, the learned state Counsel, Ms Odumba, reminded the Court that the offence of Manslaughter carries the sentence of Life Imprisonment.
11. Indeed, pursuant to **Section 205** of the **Penal Code**, any person who commits the felony of **manslaughter** is liable to imprisonment for life.
12. In the circumstances, when the Petitioner could possibly have been sentenced to life imprisonment, it is difficult to understand why he

holds the view that 10 years imprisonment was harsh.

13. As regards the status of his child or children, the court notes that it is the action of the Petitioner which has caused them to be orphans.
14. The court appreciates that Covid 19 is a real pandemic in the entire world. Kenya is not an exception to the effects of the said pandemic.
15. The court takes judicial notice of the fact that persons who have underlying conditions such as diabetes are apparently prone to more serious health complications if they contract Covid 19.
16. But I am also aware from information derived from the Court Users Committee, that our Prison facilities have done a commendable job in ensuring that the inmates are not unduly exposed to corona virus.
17. I therefore find no basis upon which the Petitioner would be entitled to feel that he was more at risk whilst he was in prison custody.
18. In any event, the possibility of exposure to corona virus was not, of itself, a basis for the reduction of his prison sentence.
19. As regards the contention that the Petitioner is facing triple punishment, I find that there is only one sentence which was handed down by the court.
20. The loss of the Petitioner's wife was caused by his own hand. If it can be construed as a punishment, it is the sort of thing which was not imposed by the court or by anybody else.
21. On the other hand, as I have already stated, earlier herein, it was the Petitioner who caused his children to become orphans. He was therefore the author of that "*punishment.*"
22. The Petitioner described the shooting incident which gave rise to this case, as an accident. The learned trial Judge convicted the Petitioner for manslaughter because the prosecution had failed to prove that the Petitioner had malice aforethought.
23. If the prosecution had proved malice aforethought, the Petitioner could have been convicted for the offence of Murder.
24. I therefore hold the view that the court had already given to the Petitioner the benefit accruing from the accidental nature of the incident; and it did so by convicting him for the lesser offence of Manslaughter.
25. Accordingly, the Petitioner cannot use the same fact, to get a reduction in the sentence.
26. Incidentally, if the Petitioner held the considered view that the trial court had failed to accord him a fair trial, that would be a good reason to challenge the findings of the trial court through an appeal.
27. This court holds a jurisdiction that is concurrent to the jurisdiction of the learned trial Judge. Therefore, I cannot purport to sit on an appeal over the decision of a court of concurrent jurisdiction.
28. On the issue of mitigation, the trial court expressed itself thus, when handing down the sentence;

**"I have considered that the accused is a first offender and the mitigation proffered on his behalf by his counsel.**

**The circumstances of this case militate against a non-custodial sentence. I sentence the accused to serve ten (10) years imprisonment."**

29. I find that the trial court gave consideration to the mitigation. To my mind that would explain why the Petitioner was sentenced to 10 Years imprisonment for an offence which could attract Life Imprisonment.

30. Finally, I find that the decision by the Supreme Court, in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC (2017) eKLR** is not applicable to this case. I so hold because that case addressed the issue about the mandatory nature of the sentence provided for under **Section 204** of the **Penal Code**. The learned Judges held as follows;

**"We are of the view that the mandatory nature of this penalty runs counter to the constitutional guarantee enshrining respect for the rule of law. We now lay to rest the quagmire that has plagued the courts with regards to the mandatory nature of Section 204 of the Penal Code.**

**We do this by determining that any court dealing with the offence of Murder is allowed to exercise judicial discretion by considering any mitigation factors in sentencing an accused person charged with and found guilty of that offence."**

31. In this case the Petitioner was charged with the offence of Murder but he was not convicted for that offence. He was convicted for the lesser offence of Manslaughter.

32. Secondly, the trial court did not impose any mandatory sentence upon the Petitioner.

33. In the result, the Petition lacks merit, and is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL 2021**

**FRED A. OCHIENG**

**JUDGE**