



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E053 OF 2021

BETWEEN

ERASTUS NGURA ODHIAMBO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

RULING

1. Erastus Ngura Odhiambo, the Petitioner herein, filed a Petition on 23rd April 2021, in which he is seeking the following orders;

1. For a declaration that his rights to a fair trial under the constitution were infringed.

2. That, imprisonment of 20 years imposed is not the minimum sentence, thus this Hon. Court has discretion to consider mitigation factors and consider time already served sufficient.

3. Any other orders that this Hon. Court may deem appropriate in the circumstances.

2. The Petitioner also filed an application by way of a Notice of Motion on the same date, in which he is seeking the following orders:

1. THAT, this petition be certified as urgent and be heard on priority basis.

2. THAT, the substantive judicial review be heard on priority basis.

3. 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 defense of provocation/manslaughter, thus shifting the burden of prove against the petitioner.

4. THAT the Hon. Court be pleased to make distinction between the term “liable” provided in manslaughter/provocation and “shall” stipulated in murder charge under the Penal Code and further consider the mitigating factors.

5. 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.

6. THAT the Hon. Court be pleased to nullify/reverse the sentence and make an order acquitting the petitioner, and or review the sentence.

3. The said Petition and application are supported by an affidavit of the Petitioner.

4. I have perused the said Petition, application and supporting documents, and note that the Petitioner is seeking a review of decisions of the High Court and Court of Appeal in his criminal trial and appeal. This Court’s judicial review jurisdiction is a supervisory jurisdiction, pursuant to Article 165(6) of the Constitution and section 9 of the Fair Administrative Action Act. In this respect Article 165(6) states as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority

exercising a judicial or quasi-judicial function, but not over a superior court.”

5. This Court as a judicial review Court, therefore has no jurisdiction to review the decisions of superior Courts, which are stated and identified in the Constitution as the Supreme Court of Kenya, the Court of Appeal, and the High Court and Courts of Equal Status.

6. It is also notable that the *ex parte* Applicants seeks to review his sentencing in a murder trial, and has in this respect brought his Petition pursuant to the provisions of Article 50(2)(q) of the Constitution, section 264 of Criminal Procedure Code, and Article 165 (3) (d) (ii) of the Constitution. He has also relied on the decision of the Supreme Court in **Francis Karioko Muruatetu. Petition No.15 of 2015.**

The Orders

7. In the premises I hereby transfer the Petition and application herein to the Criminal Division of the High Court of Kenya in Nairobi for further hearing and determination. The said Notice of Motion shall be placed before the **Duty Judge** at the **Criminal Division, Milimani Law Courts Nairobi** on **5th May 2021** for directions.

8. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and orders by electronic mail to the Petitioner, and to the Deputy Registrar of the Criminal Division, Milimani Law Courts Nairobi, by **close of business on 30th April 2021.**

9. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE