



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 75 OF 2020

PHILIP ONYANGO OMONDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

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 and on 20th March 2012, he was sentenced to twenty five (25) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal in the Court of Appeal **Kisumu Criminal Appeal No 177 of 2014**. He withdrew the said Appeal and by order dated 27th March 2019, the Appeal therein was withdrawn resulting in its dismissal pursuant to Rule 68 (1) of the Court of Appeal Rules.
3. On 26th August 2020, he filed an application for review of the sentence. In his Affidavit in support of his said application, he stated that while in prison, he had undergone several rehabilitation and reformation programmes. He further explained that he had enrolled and fruitfully engaged in spiritual training and had acquired a Diploma in Biblical Studies and a Certificate in Discipleship Bible Study from International School of Ministry and the Bible League respectively which would enable him avoid and overcome crime.
4. He added that he had also undertaken technical courses in welding and obtained grade 3, 2 and 1 trade test Certificates and was now ready to be integrated back into the society.
5. He asked this court to consider that he committed the offence at a tender age which contributed to him engaging in bad company, that he was a first offender and remorseful and being of age now, he could no longer succumb to peer pressure and bad company.
6. He further urged this court to consider the four (4) years that he had spent in custody between 21st June 2008 and 20th March 2012 as part of the sentence that was meted upon him. To buttress this point, he relied on the case of **Ahmed (sic) Abolfathi Mohamed & Another vs Republic [2018] eKLR** where the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.
7. He relied on the provisions of Article 165 (5) (3) of the Constitution of Kenya 2010 to argue that this court was bestowed with unlimited powers to hear the Petition herein, the cases of **Lillian S.” vs Caltex Oil Kenya Ltd [1989] KLR**, **Francis Karioko Muruatetu [2017] eKLR**, the Judiciary Sentencing Policy Guidelines, 2016 and Section 333(2) of the Criminal Procedure Code in support of his case.
8. The State did not oppose his Petition for review of this sentence. It conceded that Section 333 (2) of the Criminal Procedure Code was not considered when he was sentenced.
9. In the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court set out the following as mitigating factors for re-sentencing:-

a. Age of the offender;

b. Whether he was a first offender;

- c. Whether he had pleaded guilty to the offence;
- d. Character and record of the offender;
- e. Commission of the offence in response to gender-based violence;
- f. Remorsefulness of the offender;
- g. The possibility of reform and social re-adaptation of the offender;
- h. Any other factors the court would consider relevant.

10. This court noted that the deceased suffered greatly as he bled profusely before he succumbed to the injuries that were meted on him by the Petitioner. The Petitioner was furious and armed. He engaged in a scuffle with the deceased in which he fatally injured the deceased. The murder can only be said to have been gruesome. It was pre-meditated and malicious as the Petitioner waylaid the deceased among others armed with a sword.

11. A perusal of the affidavit attached to the Petitioner's application for review of sentence and his written submissions showed a person who was remorseful. Indeed, vide his letter dated 1st March 2021 and filed in court on 4th March 2021, the officer in charge Nakuru Main Prison had vouched for his good conduct.

12. Having said so, this court noted that the Petitioner was not sentenced to death thus rendering the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) irrelevant in the circumstances of the case, However, while there was need to send a strong message to the society that violence against other persons is strongly condemned, convicts who have reformed and are remorseful ought to be given a second chance and have a new lease of life.

13. The Petitioner was young when he committed the offence. He had already spent more than nine (9) years behind bars and had had sufficient time to reflect on his actions. Taking all the factors into consideration, this court came to the firm view that a sentence of twenty (20) years was fair in the circumstances of the case herein.

DISPOSITION

14. For the foregoing reasons, the court found that the Petitioner's Petition for review of the sentence that was filed on 26th August 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Applicant for the offence of murder but reviews the twenty five (25) years imprisonment sentence to twenty (20) years with effect from the date of the sentence. The period the Petitioner spent in custody shall be taken into account when computing the sentence in accordance with Section 333(2) of the Criminal Procedure Code.

15. It is so ordered.

DATED and DELIVERED at KISUMU this 29th day of June 2021

J. KAMAU

JUDGE