



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 61 OF 2020

BENARD OTIENO OKELLO.....PETITIONER

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. He was sentenced to death.
2. Being dissatisfied with the said decision, he lodged an Appeal in the Court of Appeal **Kisumu Criminal Appeal No 205 of 2014**. On 31st January 2020, the said court upheld his conviction but substituted the death sentence with a term of thirty (30) years imprisonment from the date of conviction.
3. On 18th August 2020, he filed an application for review of sentence. In his affidavit in support of his said application, he stated that he left behind children of tender age who needed him and have continually suffered because of his incarceration.
4. He further stated that he was a first offender, remorseful and pointed out that he had undergone several rehabilitation trainings which included: ISOM Certificate and Diploma, Certificate in Prisoner's Journey, Certificate in Bible League International, Emmaus Certificate and Diploma, Lamp and Light Certificate and Diploma, Grade (iii) in masonry and which are meant for developing good morals and self-reliance in a person and would enable him integrate well back to society.
5. He submitted that the prison term of thirty (30) years was excessive in its entirety and urged this court to order that his sentence run from the date of his arrest as provided in Section 333(2) of the Criminal Procedure Code. He also invoked Sections 216, 329, 333(2) and 389 of the Penal Code in asserting that the court has discretion to consider the mitigating circumstances of the offender before imposing a sentence. He added that the said Sections are progressive provisions of law which guarantees enjoyment of rights provided for under Article 50 (2) (p) of the Constitution of Kenya.
6. He prayed for a non-custodial sentence and relied on several cases among them the cases of **Ahamed Abdulfathi Mohamed & Another vs Republic [2018] eKLR**, **Arthur Muya Muriuki vs Republic (2010)** (e KLR citation not provided) and **Peter Kariuki Mathi vs Republic [2019] e KLR** in support of his case.
7. The State opposed his Petition for review of sentence on the ground that the present Petition for re-sentencing was *res judicata* as it was dispensed with by the Court of Appeal in **Kisumu Criminal Appeal No 205 of 2014** (supra).
8. Reading the said Judgment, the Court of Appeal rendered itself as follows:-

“On the death sentence, we have to take into consideration the recent developments in jurisprudence on sentencing following the Supreme Court’s decision in Francis Karioko Muruatetu vs Republic & Another [2017] e KLR where courts were advised to consider mitigating factors as put forward by an accused while bearing in mind that sentencing is a judicial function. On conviction, the appellant prayed for leniency stating that he was the sole breadwinner for his three (3) children. Bearing in mind that the appellant was also a first offender, not of course losing sight of the savage attack and pain inflicted on the deceased, we are inclined to substitute the death sentence with a term sentence of thirty (30) years imprisonment from the date of conviction.”

9. It was slightly more than a year since the Court of Appeal rendered its decision on 31st January 2020. Indeed, whereas the Constitution of Kenya, 2010 does not specifically provide that the decisions of the Court of Appeal are binding on the High Court, Environment and Land Court, Employment and Labour Relations Court, Magistrates' courts, Kadhis' courts and all tribunals like that in Article 163(7) of the Constitution of Kenya, the common law doctrine that decisions of higher courts are binding on courts below it apply.

10. This court could not therefore purport to sit on appeal of a decision of a higher court. Further, as was correctly stated by the State, this matter was *res judicata*. It would be a mockery of justice and an affront to the doctrine of *stare decisis* for this court to delve into the same issues that the Court of Appeal heard and determined.

11. Having said so, this court could still address its mind to Section 332 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) as in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR**, 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.

DISPOSITION

12. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition that was filed on 18th August 2020 was partly successful. As his sentence and conviction was upheld by the Court of Appeal, his prayer for review of the sentence was therefore unmerited and the same be and is hereby dismissed. However, his prayer that the court considers the provisions of Section 333(2) of the Criminal Procedure Code was merited and the same be and is hereby allowed.

13. It is hereby ordered and directed that the period the Petitioner spent in custody, if at all, shall be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

14. For the avoidance of doubt, this court has only pronounced itself on this issue as the Petitioner did not provide it with a copy of the Court of Appeal and it was not able to access a copy of the same after conducting all due diligence at the time.

15. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF JULY 2021.

J. KAMAU

JUDGE