



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E026 OF 2021

ISACK ODUOR OBIERO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant herein was tried and convicted of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code and was sentenced to death on 9th February 2017.
2. Being dissatisfied with the said decision, the Applicant lodged an Appeal in the Court of Appeal **Kisumu Criminal Appeal No 27 of 2017**. In its judgment of 21st November 2019, the Court of Appeal quashed the conviction for the offence of murder and set aside the death sentence. In substitution, the said Court convicted him for the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code and sentenced him to seven (7) years imprisonment with effect from 9th February 2017 when he was sentenced.
3. On 2nd March 2021, he filed an application for review of the sentence. The said application was supported by his Affidavit in which he stated that he had served more than two-thirds of the sentence. He pointed out that he was entitled to a remission of a third of his sentence.
4. He added that the sentence was manifestly excessive in the circumstances bearing in mind the diligent service he had offered Kenyans while serving the Administration Police Service for twelve (12) years prior to his arrest.
5. He asserted that he was a first offender and was remorseful. He submitted his Certificates of Completion in Emmaus Bible Correspondence Courses, Discipleship training on growing and maturing in Christ, the Prisoners Journey and Diploma in Biblical studies at AFCM International Training Center Africa which showed that he had been rehabilitated and was therefore ready to be integrated back to society.
6. He drew the courts attention to Section 26 (2) of the Penal Code where it is stipulated that where a person was liable to life imprisonment or any other period, he or she could be sentenced to any shorter term. He relied on the case of **Philip Muthiani Kathiwa vs Republic [2015] eKLR** where the court arrived at a similar conclusion.
7. He further placed reliance on the case of **Josiah Mutua Mutunga & Another vs Republic [2019] eKLR** where the court therein held that what was required was to establish if an applicant's incarceration had achieved the objective of punishment. He also referred this court to the case of **Magret Njeri Kichilis vs Republic [2017] eKLR** where certificates of merit on rehabilitation programmes undertaken in prison were taken into account during re-sentencing. He also submitted that he had enrolled for his PhD before he was arrested.
8. He averred that he was a family man and his children and siblings have since suffered and disintegrated due to his incarceration. He submitted that the Article 53(2) of the Constitution of Kenya, 2010 which provides that the children's best interests are paramount. He urged the court to consider the Judiciary Policy Guidelines which set out guidelines for courts to exercise discretion in meting out custodial and non-custodial sentence. He thus urged this court to reduce his sentence and he be given a non-custodial sentence.
9. On its part, the State opposed the Applicant's application for review of sentence. It contended that this court lacked jurisdiction to revise the orders granted by the Court of Appeal regarding his sentence.
10. It asserted that Section 362 and 364 of the Criminal Procedure Code gives this court the power of revision but the same can only be exercised over the sentence and/or proceedings of subordinate courts for the purpose of satisfying itself as to the correctness, legality or

propriety of any finding, sentence or order recorded or passed, which was not the case herein.

11. It relied on the case of **Abiud Muchiri Alex High Court of Kenya Embu Criminal Review No 12 of 2020** (eKLR citation not provided) where the court held that, under the doctrine of precedents, the High Court cannot review decisions of the Court of Appeal as it is a superior court under the hierarchy of court structure as provided for under the Constitution of Kenya 2010.

12. It argued that Section 354 (3) (a) (iii) of the Criminal Procedure Code, relied on by the Applicant, cannot assist him as the said section deals with the power of the High Court to reduce a sentence on appellate level. It added that Section 205 of the Penal Code provides that a person convicted for the felony of manslaughter is liable to imprisonment for life and therefore the sentence of seven (7) years meted upon the Applicant was not a mandatory sentence.

13. Notably, in its judgement of 21st November 2019 aforementioned, the Court of Appeal rendered itself as follows:-

“For the foregoing reasons, the appeal is allowed the extent that:

(i) The conviction for the offence of murder is quashed and the sentence of death is set aside.

(ii) In substitution, the appellant is convicted for the offence of manslaughter contrary to section 202(1) as read with Section 205 of the Penal Code.

(iii) The appellant is sentenced to seven (7) years imprisonment with effect from 9th February 2017 when he was sentenced.

14. As the Court of Appeal had reviewed the initial sentence meted upon the Applicant herein, this court had no power to revise its decision as was submitted by the State because the Court of Appeal was superior Court to it.

15. The felony of manslaughter attracts a sentence of life imprisonment as provided for under Section 205 of the Penal Code Cap 63 (Laws of Kenya). The Court of Appeal showed a lot of leniency in sentencing the Applicant to seven (7) years imprisonment. He admitted in his Grounds of application that he had been given remission under Section 46 of the Prisons Act Cap 90 (Laws of Kenya), which was a third of his total sentence.

16. Despite, his rehabilitation which he demonstrated with Certificates of Completion in various areas in preparation for re-integration back to society, and the Officer in-charge, Kisumu Maximum Prison vouching for his good conduct vide letter dated 6th February 2021 and filed on 9th April 2021, it was this court's view that this was not a suitable case for it to exercise its discretionary power of revision. It was bound by the law of precedents. This means that it cannot review decisions that have been delivered by courts that are superior to it.

17. Going further, in its decision of 6th July 2021 in the case of **Francis Karioko Muruatetu & Another vs Republic, Petition No 15 of 2015**, the Supreme Court was categorical that review of sentences could only be done in cases where persons had been convicted and sentenced for the offence of murder. The Petitioner herein was convicted and sentenced of the offence of manslaughter.

18. Finally, in cases where a convict has only a small part of his sentence to serve, he can be released under the Community Service Order Act Cap 93 Laws of Kenya. Unfortunately, the High Court can only revise decisions that are delivered by courts below it. The Petitioner herein would therefore not have benefitted from that remained Act as he had been tried by the High Court and his sentence reviewed by the Court of Appeal and because manslaughter does not fall within the categories that a convict can benefit from.

DISPOSITION

19. For the foregoing reasons, the upshot of this Court's decision was that the Applicant's application lodged on 2nd March 2021 was not merited and the same be and is hereby dismissed. His conviction and sentence meted upon him by the Court of Appeal be and is hereby left undisturbed.

20. It is so ordered.

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

J. KAMAU

JUDGE