

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E043 OF 2021

HAROLD OKELLO OMONDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

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. He was sentenced to twenty (20) years imprisonment.

2. On 14th April 2021, the Applicant filed this application for review of his sentence based on Section 333(2) of the Criminal Procedure Code. In his affidavit that he swore in support of his said application, he stated that he had undergone reformation programmes while in prison and obtained Grade 3 in Carpentry and joinery and training in Theology courses hence would integrate well back to society.

3. He submitted that he was remorseful of the events that led to the offence he committed. He argued that this court had jurisdiction to determine the rights and fundamental freedoms of an accused person in the bill of rights as enunciated in Article 21(1), 23(1), 24(1) and 27(1) of the Constitution of Kenya, 2010. He reiterated his aforesaid averments and pleaded with the court to show him mercy as he had a young family to take care of.

4. The State opposed his application for review of sentence under Section 333 (2) of the Criminal Procedure Code on the ground that this court had no power to review its own sentence under Section 362 and 364 of the Criminal Procedure Code and submitted that he ought to appeal. It added that Trial Court considered all mitigating circumstances and the circumstances under which the offence was committed before imposing on him the twenty (20) years imprisonment sentence.

5. It was categorical that the offence of murder carries a maximum of death sentence which was still lawful. It asserted that the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** only outlawed the mandatory nature of the death sentence.

6. Although both parties herein indicated that there is no appeal pending, the Court of Appeal registry brought to the attention of this Court the fact that there is a pending appeal by the Applicant herein in the Court of Appeal **Kisumu Criminal Appeal No 100 of 2020**.

7. Having noted that there is a pending appeal before the Court of Appeal this court found it prudent not to make any determination herein to avoid abuse of court process and/or rendered this application an academic exercise for the reason that a review and an appeal cannot run at the same time.

DISPOSITION

8. The upshot of this court's decision was that the Applicant be and is hereby directed to make a choice of either to proceed with his Appeal in the Court of Appeal or to withdraw the same to allow a determination of his application for review of sentence.

9. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE