

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO 170 OF 2019

JACKSON MAINA WANGUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant comes to court by way of a Notice of Motion under Certificate of Urgency. The application is dated 3rd of June 2019. It seeks review of the sentence. The main ground in support of this application is that the applicant has engaged the family of the deceased in a successful process of mediation and reconciliation and that he has served two-thirds of the sentence. He prays for a non-custodial sentence for the remainder of the sentence.

In his brief submissions the applicant told the court that the family of the deceased has forgiven him. He also told the court further that he is the sole bread winner for his family and that his family is suffering while he is in jail. He asked the court to review the sentence and allow him to serve the remaining sentence outside jail.

In response the Respondent while opposing the application, submitted that the reconciliation sought by the applicant ought to have come earlier and not at this stage. It was submitted that the sentence meted out to the applicant is lenient.

I have considered this matter. To put this application into perspective it is important to give a short history of this case. The applicant was charged jointly with another for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge showed that the offence was committed on the night of 7th and 8th May 2012 at the then Click Club along Baricho Road in Industrial Area Nairobi. Both were tried for that offence but the co-accused who was the 2nd accused in High Court Criminal Case No. 35 of 2012 was acquitted by this court after the court found that he had no case to answer. The applicant was placed on his defence. In a judgment delivered on 14th March 2017 the applicant was found guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code. After mitigation from the accused this court sentenced him on 22nd March 2017 to five years' imprisonment. This is the sentence the accused seeks to have reviewed. In meting out that sentence and after taking into account that the accused was a first offender and was remorseful as well as his personal and family circumstances, some of which circumstances the applicant relies on in this application, this court pronounced itself as follows:

“In this sentencing process, I have taken into account the provisions of Section 205 of the Penal Code, the cited authority and the Sentencing Policy Guidelines. I have also taken into account the personal circumstances of the 1st accused and the circumstances surrounding the commission of this offence. In sentencing him I am alive to the requirement that the sentence meted out must be proportionate to the offending behaviour and is in my view merited in regard to the offence committed. I have compared various authorities in respect of the offence of manslaughter and I am satisfied that similar offences have attracted similar sentence. I have also observed the principles of equality, uniformity and consistency in this sentencing process. In my considered view after taking into consideration all the factors mentioned above including the time it has taken to conclude this case as well as the principles set out in the cited authority, and bearing in mind that the penalty of life imprisonment for the offence of manslaughter prescribed under Section 205 of the Penal Code is the upper limit, I hereby sentence the 1st accused Jackson Maina Wangui to five years imprisonment.”

This court is aware that the applicant exercised his right of appeal and lodged Criminal Appeal No 42 of 2017. He also sought stay of the sentence before the Court of Appeal pending the anticipated appeal. The application for stay was declined by the Court of Appeal. However the applicant filed a Notice of Withdrawal of Appeal dated 25th October 2018. He supported that Notice with an affidavit in support sworn by him on 25th October 2018. In paragraph 5 of that affidavit the applicant deposed that **he was no longer desirous to pursue the Appeal lodged under a Memorandum of Appeal dated 30th June 2017 and filed on 4th July 2017**. In paragraph 6 of the affidavit the applicant deposed that he had taken the advice of his legal counsel, which advice he believed was legally cogent, on the consequences of his voluntary withdrawal of the appeal and that he was not induced or coerced into withdrawing the appeal but was doing it voluntarily. The Court of Appeal in an order issued on 5th February 2019 allowed the applicant to withdraw the Appeal pursuant to Rule 68 (1) of the Court of Appeal Rules.

I have considered this matter. I find it insincere for the accused to come back to this court when he had the chance to pursue his appeal and when he decided to wave his rights to an appeal and voluntarily withdraw the appeal. In the affidavit in support of the Notice to Withdraw the Appeal the applicant does not explain what informed his decision to withdraw the Appeal but whatever the case he exercised his right of choice.

It is a fact that the offence of manslaughter attracts the maximum sentence of life imprisonment. Although “**life imprisonment**” has not been

defined by the courts in this country, but whatever the case it cannot definitely mean five year which by any definition is a very lenient sentence. In arriving at that sentence this court took into account all the circumstances of the case as shown in the excerpt I have cited above. In the end it is my finding that the accused has not demonstrated why this court should interfere with its order in sentencing the applicant to five years imprisonment for the offence of manslaughter. The circumstances of this case are fresh in my mind and in my view the sentence of five years is quite lenient. Consequently this application is declined. The applicant shall serve the remainder of the sentence. Orders shall issue accordingly.

Dated, signed and delivered in open court on this 24th day of October 2019.

S. N. Mutuku

Judge