



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPLICATION NO.99 OF 2019

CHRISTINE SYOMBUA MUTHEMBWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. She was sentenced to 10 years imprisonment by the Principal Magistrate's Court at Kithimani and she later appealed to this court which appeal was unsuccessful. She has now applied to this court under inter alia Section 333(2) of the Criminal Procedure Code for review of sentence.
2. The state has not filed any response to the application.
3. The application was disposed of by way of oral submissions. The appellant submitted that she be considered for resentencing and that she be considered for release to join her children. Mr. Cliff Machogu, prosecution counsel made no submissions and left the matter to court.
4. The issue for determination is whether the court may grant the orders sought.
5. The record bears witness that there was judgement that was passed by this court on 10th December, 2018. The word "judgment" is defined in **Jowitt's Dictionary of English Law 2 Ed. at p.1025** as follows:

"Judgment, a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the court. The term "judgment" is also used to denote the reasons which the court gives for its decision: so that where the court consists of several judges, it may and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the court in the technical sense of the word."

6. The term *functus officio* is defined at p.840 of Jowitt's Dictionary of English Law 2 Ed.:

"Functus officio (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted."

7. A look at Section 202 as read with Section 205 of the Penal Code shows that the finding of the trial court with regard to sentence and this court on appeal is within the law hence there is no reason to interfere with the sentence of the trial court. The applicant appealed against conviction and sentence and thus this court having made its final determination on the same cannot sit on appeal and rehear this matter.
8. Similarly, **Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

9. I find no error or irregularity or illegality of principle when the court maintained the sentence of ten years imprisonment meted on the appellant. It is the considered opinion of this court that the application lacks merit and the same is dismissed. The circumstances obtaining in the case of Francis Karioko Muruatetu and Others V R (2017) eklr as relied upon by the applicant herein are not applicable herein. The circumstances were duly considered by the trial court and this court and hence the only available avenue is for the applicant to lodge appeal to the court of appeal.

10. With regard to the request that her time in custody should be considered, Sections 333 (2) of the Criminal Procedure Code that states:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

11. Having had due regard to Section 333 (2) of the Criminal Procedure Code I find that the request by the applicant has merit. Accordingly, this court finds that the computation of ten (10) years that the applicant was sentenced be inclusive of the period she was in custody. I note that she was arrested on 11.3.2013 and was granted bond on 25.4.2013 and seemingly was out till 21.9.2016 hence the sentence shall take into account the one and half months that she spent in remand custody. Save only to that extent the applicant’s application filed on 20/6/2019 is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **18th** day of **December, 2019**.

D. K. Kemei

Judge