REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 38 OF 2020

CLIFF BIKERI MOKUA.....1ST PETITIONER

EDWIN CHWEYA MOKUA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Petitioners, **CLIFF BIKERI MOKUA** and **EDWIN CHWEYA MOKUA**, have petitioned the Court to exercise the powers bestowed upon it by **Section 333 (2)** of the **Criminal Procedure Code**.

1. Their request is that the sentence of 20 Years Imprisonment be reduced by the period which they spent in custody during their trial.

2. The Petitioners told the Court that they were first offenders, and they had reformed.

3. They had also taken up trainings whilst in prison custody. Indeed, they had both been elevated to the status of Trustees within the custodial set-up.

4. In the meantime, each of them had developed some ailments, for which they require treatment that may not be available within prison. Therefore, in order to ameliorate their sufferings, the Petitioners sought non-custodial sentence.

5. The Respondent submitted that the petition herein constituted an abuse of the court process.

6. It is common ground that the Petitioners had previously canvassed **CRIMINAL PETITION NO. 87 OF 2018**, through which they sought re-sentencing.

7. That earlier Petition was determined on 21st February 2019, and it is what culminated in the sentences being reviewed from the original Death Penalty to 20 Years Imprisonment.

8. Whilst delivering the decision in **CRIMINAL PETITION NO. 87 OF 2018**, the Court already took into consideration all the mitigating factors which the Petitioners have, again, raised herein.

9. I therefore hold that it is not open to the court to have a second look at the very same matters which had already informed its earlier decision, and use them to effect a further review of the sentence.

10. As Ms M. Odumba, learned prosecution counsel has submitted, the attempt to persuade the court to grant a further review of the sentence, based upon matters which had already formed the foundation of the previous decision on re-sentencing, constitutes an abuse of the process of the court.

11. However, the invocation of **Section 333 (2)** of the **Criminal Procedure Code** is a new matter.

12. I hold the view that the Petitioners ought to have raised that issue when they first petitioned the court for re-sentencing, so that the court could have addressed every aspect on

re-sentencing, at one go.

13. I emphasize that in appropriate instances, the court may well be entitled to strike out subsequent petitions which raise issues that could have been raised in the earlier petitions that had been filed by the same petitioners. There is already a lot of pressure on the courts, due to the very high number of cases which they have to give due consideration. Therefore, the courts have a duty to the persons who approach us, seeking justice in a timely fashion, to ensure that multiplicity of cases is avoided.

14. In principle, the courts would be justified in declining to entertain an application raising matters which the Applicant could have raised in an earlier case, unless the Applicant demonstrated, to the court's satisfaction, that there was a good reason why he ought to be allowed to raise such matters in a subsequent application.

15. In this case, as I have already intimated, the mitigating factors had already been raised, and had been given due consideration by the court.

16. But the Petitioners had not invoked the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.

17. Secondly, the said statutory provision is not dependant upon the mitigating factors. The said Section provides as follows;

> ***"Subject to the provisions of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day, of the date on which it is 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."***

18. I have carefully perused the record of the proceedings before the trial court. I noted that on 24th October 2011, the learned trial magistrate granted Bond to both the Petitioners.

19. It is only after the Petitioners were placed on their defence that, on 23rd November 2012, the trial court cancelled their Bonds.

20. Thereafter, the Judgment was delivered on 30th November 2012.

21. Accordingly, the only period which the Petitioners appear to have stayed in custody, whilst still on trial, is about 7 days.

22. I therefore find that the said period of 7 days be taken into account when the prison authorities calculate the actual duration of the sentence. In effect, the 20 Years Imprisonment shall be reduced by the 7 days.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **13th** day of **May** 2021

FRED A. OCHIENG

JUDGE