



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL PETITION NUMBER 15 OF 2020

JOSEPH THUO MWANGI.....1ST PETITIONER

KENNEDY RADOALA ONGAGO.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Joseph Thuo Mwangi and Kennedy Radiala Ogango – the 1st and 2nd petitioners filed a Notice of Motion on 11th September 2021 brought under **Article 23 and 165(3)(a)** of the **Constitution**.
2. The Notice of Motion is supported by the affidavits of each of the petitioners.
3. Each of the petitioners depones that they were charged with murder Contrary to Section 203 as read with 204 of the same Code. After a full trial on 27th May 2020, they were each sentenced to 15 years imprisonment and because they had been in custody from 15th January 2014 the trial court in compliance with Section 333 of the Criminal Procedure Code set the 15 years to run from 15th January 2014.
4. That because of the prevailing situation at the Court of Appeal, that is the shortage of judges, they do not wish to pursue their appeals in the Court of Appeal as they are apprehensive the appeal will never see the light of day.

In the circumstances they seek the order that:-

“This Honourable court be pleased to order that the three years balance of our sentence be substituted with a probationary sentence or sentence order the Community Service Act Number 10 of 1998 in the interest of justice.”

Joseph Thuo depones that he is now a reformed person, completely remorseful and ready to adhere to the laws of the land. That he is of poor health which deteriorated more while in remand custody.

Kennedy Radiala depones that he has reformed and is of poor health.

In support of the petition Kennedy filed written submissions, Joseph made oral submissions.

Joseph reiterated the averments in his affidavit, adding that he was a 1st offender, had committed the offence under peer influence, that he had sent his family to start reconciliation with the family of the victim, further that his release on a non-custodial sentence would contribute to the decongestion of prison.

In his written submissions Kennedy urged the court to be guided by the Sentencing Policy Guidelines 2016 – on the objectives of sentencing:- retribution, deterrence, rehabilitation, restorative justice, community protection, reintegration.

He argues that he has been behind bars for more than 6 years and that this sufficient time – as he has walked the path of rehabilitation and felt *“the wrath of his crime in his veins and nerves and utterly regrets the same”*. That he has engaged in spiritual training and counselling.

Further that the severity of a sentence depends on the age of the accused person – and that it has been held that the younger the offender, the less severe the sentence should be – that at the time of the offence he was of a youthful age and a first offender.

That the authors of the **Probation of Offenders Act** had in mind, and were convinced that offenders could walk the journey of transformation through counselling while being monitored by a Probation Officer – and that a probation sentence allowed the offender to fend for himself while receiving the support of the family in transformation.

He argued further that a probation sentence born from a custodial sentence was perfect and provident in the achievement of sentencing goals.

Ms. Murunga for the state opposed the application under **Section 379(1) of the Criminal Procedure Code**. She submitted that the issues the petitioners were raising ought to have been raised in mitigation before the trial court. That the trial court must have considered that mitigation at sentencing because they were each sentenced to 15 years imprisonment for an offence that carries the maximum sentence of death.

While writing this ruling, I did not get the original court file in **Nakuru HCR 10/2014** but I found the judgment delivered on 16th April 2020 and reported as **Republic –vs- Kennedy Rachiala Ongango & 3 Others [2020] eKLR**.

It is from this judgment that I gleaned the facts of the case. The two petitioners were charged together with two others and they were *bodaboda* riders who lynched the deceased whom they suspected to have stolen the motor bike of one of their colleagues by the name Obonyo.

The issue for determination is whether this court can grant the prayers sought under **Article 165(3) (a) of the Constitution**, which gives this court the unlimited original jurisdiction in criminal and civil matters. The petitioners have also cited **Article 22(1)**, on the right to bring proceedings claiming that a right/fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; **Article 23** on the jurisdiction of this court to grant appropriate remedies; **Article 25** on the limitation of fundamental right and freedom; **27(1) and (2)** on equality before the law, and the right to equal protection of the law; **Article 28** on human dignity; **Article 29** on freedom and security of the person; **Article 48** on access to justice; **Article 50(1) and (2)** on right to fair hearing; **Article 165(3)(a), 258** on enforcement of the Constitution and **Article 259** on construing the Constitution.

Section 379(1) of the Criminal Procedure Code provides;

“(1) A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal—

(a) against the conviction, on grounds of law or of fact, or of mixed law and fact;

(b) with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.

(2) A person convicted on a trial held by the High Court and sentenced to—

(a) a term of imprisonment of twelve months or less; or

(b) a fine exceeding two hundred shillings but not exceeding two thousand shillings; or

(c) a fine of two hundred shillings or less, where the Court of Appeal or the trial judge is of the opinion that the case involves a question of law of great general or public importance, may, with the leave of the Court of Appeal, or upon a certificate of the trial judge that it is a fit case for appeal, appeal against his conviction on any ground which appears to the Court of Appeal, or to the judge, to be a sufficient ground of appeal.

(3) No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by the High Court, except as to the extent or legality of his sentence.

(4) Save in a case where the appellant has been sentenced to death, a judge of the High Court, or of the Court of Appeal, may, where an appeal to the Court of Appeal has been lodged under this section, grant bail pending the hearing and Determination of the appeal.

(5) Where a person has been acquitted in a trial before the High Court in the exercise of its original jurisdiction and the Director of Public Prosecutions has, within one month from the date of acquittal or within such further period as the Court of Appeal may permit, signed and filed with the Registrar of that court a certificate that the determination of the trial involved a point of law of exceptional public importance and that it is desirable in the public interest that the point should be determined by the Court of Appeal, the Court of Appeal shall review the case or such part of it as may be necessary, and shall deliver a declaratory judgment thereon.

(5)(A) Where the Director of Public Prosecutions certifies that a sentence passed by the High Court in the exercise of its original jurisdiction should be reviewed by the Court of Appeal, the Court of Appeal may, after giving the accused person or his advocate an opportunity of being heard, make such order by way of enhancement of sentence or maintaining the sentence passed as is consistent with the ends of justice.

(6) A declaratory judgment under subsection (5) shall not operate to reverse an acquittal, but shall thereafter be binding upon all courts subordinate to the Court of Appeal in the same manner as an ordinary judgment of that court.”

I have carefully considered the provisions of the Constitution, and the provisions of the **Criminal Procedure Code**. The petitioners have not demonstrated what fundamental freedom/right has been denied, violated or threatened to warrant any intervention by this court. By merely citing those provisions without proceeding to give any factual basis for the same leaves the court with nothing to consider.

In addition, the provisions of **Section 379(1) of the Criminal Procedure Code** give the petitioners, the right to file on appeal against the sentence of fifteen (15) years imposed by the court. While their apprehension that their appeal may not see the light of day in the Court of Appeal due to the limited number of Judges is indeed tenable, and an issue of access to justice, it does not confer jurisdiction on this court to carry out that court's work.

I note that the petitioners were sentenced on 27th May 2020 to fifteen (15) year's imprisonment to run from 2014 – so that sentence is to run up to 2029. There is no evidence placed before me that the Court of Appeal has come to a complete stand still. In any event as at the time of this Ruling the seven (7) new Court of Appeal judges had been sworn in. The petitioners ought to file their appeal.

The prayers sought require this court to exercise its power on appeal or on review of a matter emanating from the subordinate court under the Criminal Procedure Code to alter a sentence. The petitioners' case does not fall into either of the categories.

This court has already exercised its original criminal jurisdiction by hearing the charge against the petitioners.

The petitioners' recourse is before the Court of Appeal.

The Petition is declined.

DATED, SIGNED and DELIVERED via ZOOM this 18th day of JUNE, 2021.

MUMBUA T. MATHEKA

JUDGE

CA Edna

Ms. Murunga for DPP

Petitioners present virtually