



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION CASE NO. E018 OF 2021

REPUBLIC.....ODPP

VERSUS

OLYMPIA KINYA THAINE.....APPLICANT

RULING

1. The Applicant was charged and convicted for the offence of ‘Murder contrary to Section 203 as read with Section 204 of the Penal Code.’ She was thereafter sentenced to serve imprisonment for 5 years on 9th October 2019.

2. By an application filed on 22nd March 2021, the Applicant seeks to invoke this Court’s jurisdiction under Section 362 and 364 of the Criminal Procedure Code, Cap 75 for revision of her sentence. She claims to be terminally ill having been diagnosed with severe hypertension, rheumatism, PUD and urinary incontinence and that these conditions are delicate, care intensive and financially draining. She claims that the conditions in prison are not favourable and her continued stay therein poses a risk to health owing to the COVID 19 pandemic. She has annexed medical reports confirming her ailment.

3. She avers that she is earnestly remorseful and she fully regrets her actions and that if granted a second chance, she will never repeat the mistake again. She therefore prays for leniency and a non-custodial sentence as she is a first offender.

4. The principles guiding Courts in exercising jurisdiction on sentencing are well settled. The leading authority on the question of interfering with sentence is that of *Wanjama v Republic Criminal Appeal No. 204 of 1970 (1971) EALR 493, 494*, where Trevelyan J held as follows:-

‘An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.’

5. In the circumstance, for her application to succeed, the Applicant herein must satisfy that there were some illegalities and/or factors that the trial Court may not have taken into account when it ought to have done so and vice versa, in meting out the sentence. Turning to the penalty section for the offence of murder, (Section 204 of the Penal Code), the same provides as follows: -

‘Any person convicted of murder shall be sentenced to death.’

6. However at the moment, jurisprudence has evolved and the Court is enjoined to exercise its discretion in sentencing for the offence of murder as upheld by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v. R Petition No. 15 and 16 (Consolidated) (2017) eKLR*. It appears that at the time of sentencing, the trial Court was well aware of this new development and exercised its discretion in opting to sentence the Applicant to 5 years imprisonment as opposed to the maximum penalty being the death sentence.

7. The Applicant claims that owing to her medical condition, she ought to be given a non-custodial sentence. The objectives of sentencing as set out in the *Kenya Judiciary Sentencing Policy, 2016* (see para. 92 of *Muruatetu*) are as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

8. This Court is alive to the gravity of the offence of murder. It is trite that justice must not only be served but be seen to be served. Although the Applicant claims to be remorseful and promises not to repeat her mistakes, the objectives of sentencing are not limited to the aspect of rehabilitation. The society is also a key stakeholder in the criminal justice system and there are other aspects of retribution, deterrence and denunciation. To give a non-custodial sentence for such a grievous offence as murder would not be in the interests of justice, despite the claims of ill health by the Applicant. In the face of the objectives of denunciation and punishment, this Court does not find any reason to disturb the sentence meted by the trial Court. In fact the said sentence of 5 years is already a lenient one and the Applicant must be aware of this fact. The best that may be done is to require the Prison officials to facilitate her medication as she serves her time in prison.

9. The Applicant prayed for this Court to call for the file from the trial Court. It is primarily the duty of the Applicant to request for the proceedings of the trial Court and attach them to her application. However, even without having seen the said proceedings, this Court finds that trial Court indeed exercised leniency and used its discretion well in opting to sentence her to 5 years imprisonment instead of the maximum penalty i.e the death sentence.

ORDERS

10. In the premises, this Court finds that the trial Court acted within the law in meting out the sentence and makes the following orders: -

i. The Applicant's application for revision of the Sentence and Orders of the trial Court in Meru HCCR Case No. 4 of 2014 is declined.

ii. The Sentence of 5 years imposed by the trial Court is upheld.

iii. The Officer Commanding Station, Isiolo GK Prison where the Applicant is being held in custody is directed to facilitate the Applicant's treatment and regular checkups at the hospital.

Order accordingly.

DATED AND DELIVERED ON THIS 3RD DAY OF JUNE, 2021

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Olympia Kinya Thiane, the Applicant in Person

Ms B Nandwa, Prosecution Counsel for the Respondent.