



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 14 OF 2020

HUDSON OKONDA OCHOLA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the DPP

JUDGMENT

The petitioner, **Hudson Okonda Ochola**, was arrested on the 20th October 2011 and on the next day charged with the murder of the deceased, **Duncan Irungu Wambui** alias **Ali Irungu alias Chacha**, contrary to Section 203 as read with Section 204 of the Penal Code. By a decision of **Hon. Odero J**, delivered on 22nd April 2015 in Mombasa High Court Criminal Case No. 27 of 2011, he was convicted and sentenced to death. Thereafter, he moved to the Court of Appeal filing Mombasa Criminal Appeal No. 65 of 2015.

His appeal was argued by **Ms. Otieno Advocate**, who based her argument on three grounds; that the circumstances leading to the attack and death of the deceased did not disclose proof beyond reasonable doubt of the offence of murder; that the Learned trial Judge erred in rejecting the evidence of provocation; and that the sentence was extremely harsh, punitive and excessive.

By its decision rendered on 29th July 2016, the Court of Appeal allowed the appeal. It overturned the conviction of murder and replaced it with one of manslaughter and set aside the death penalty substituting it with a twelve (12) year imprisonment sentence to run from the date of conviction by the trial Court.

Condensed, the petitioner seeks the Court's intervention asking that the duration he had spent in pre-trial detention to be considered as part of his sentence. Additionally, he prays for a probation order and that he be released on parole and the remainder of his sentence be commuted to a non-custodial sentence.

Determination

My view of the petition as filed and the averments and submissions contained therein is that the petitioner wants the Court to take into account the time he spent in pre-trial detention as part of his sentence, and that he be allowed to serve the remainder of his sentence in a non-custodial manner. The Law on the time spent in pre-trial detention is Section 333 of the Criminal Procedure Code which provides:

“333 (1) A warrant under the hand of the Judge or Magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing Judge or Magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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 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.”

Originally, the petitioner was sentenced to suffer death for the offence of murder, which conviction was overturned and a manslaughter

charge substituted, with his sentence being put at twelve (12) years from the date of conviction by the trial Court. The petitioner submits that he was incarcerated before trial for a period of six (6) months. His conviction by the trial Court was on 22nd April 2015. To date, he has served five (5) years five (5) months of his twelve (12) year sentence. Taking six (6) months' time served means that the remainder of the petitioners sentence as of today is six (6) years and seven (7) months.

As for the prayer to be released on probation to serve a non-custodial sentence for the remainder of his sentence, the petitioner alludes to discrimination in the resentencing procedures, arguing that he also ought to enjoy the benefit of a non-custodial sentence by being released on parole.

In my view, he fails to make a convincing argument as to why he should befit such a request. The petitioner stands lawfully convicted and sentenced of the offence of manslaughter by the Court of Appeal. I am hesitant to interfere with the decisions of the trial Court and the Court of Appeal and I therefore decline to do so.

In sum, Petition No. 14 of 2020 stands hereby disallowed in its entirety. The petitioner is to complete the remainder of his twelve (12) year save for the six (6) months he was held in remand custody pending hearing and determination of his case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE