



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISC. CRIMINAL APPLICATION NO.67 OF 2019**

**KELVIN KERIMA MONYANYE.....APPLICANT**

**-VERSUS-**

**STATE.....RESPONDENT**

**JUDGMENT**

1. **Kelvin Kerima Monyanye** was charged with attempted arson contrary to section 333 (c) of the Penal Code.

2. The particulars of the offence are that, on the 5<sup>th</sup> day of March 2017 at Kenyenyia market in Kenyenyia Sub-county within Kisii County the applicant attempted to unlawfully set fire to a building namely a dwelling house, the property of **Joash Otara Singa**. He was also charged with malicious damage to property Contrary to section 339(1). He is said to have destroyed property worth Kshs.7800/= belonging to **Dorcas Nyabuto**. On his own plea of guilty and after mitigation he was sentenced to serve 7 years in jail for attempted arson and 5 years for the malicious damage to property. The sentences were to run concurrently. He was sentenced on the 2/3/2017.

3. On the 11/9/2019 the appellant/applicant filed a petition of appeal. He states in his petition that he being unsatisfied by the conviction and sentence of the lower Court at Ogembo Law Courts, being imprisoned for 7 years in jail for attempted arson and malicious damages, by the Resident Magistrate, he seeks under order 133 (1) of the Constitution of Kenya 2010 and Section 19 and 20 of the Power of Mercy Cap 94 Laws of Kenya. He also seeks that he serves the remaining sentence on probation. He states he is a first offender and will not repeat the same mistake and seeks leniency.

4. In his supporting affidavit he states that he has stayed in prison and has undergone various courses and attained the certificates such as Christian theology and painting trade test grade III, II respectively and that through this he has changed his motives.

5. At the hearing of this application the applicant informed the court that he seeks to have his sentences reduced. He stated he has served 2 years out of the 7 years, that he left a young family alone, his wife is helpless and his children are young.

6. Mr. Otieno for the DPP did not submit, but left it to the court to decide.

7. To enable me consider the application I sought a sentence review probation report on the applicant. The report indicates that the complainant Dorcas who was the appellant's wife fears for her life as the inmates of the appellant keeps threatening her. The report is not favourable. It indicates that the appellant is a social misfit and is not a 1<sup>st</sup> offender. That he has served 2 years and 6 months of his sentence and he has 4 years to go and that with remission he has 2 years remaining. The report further indicates that the appellant is not remorseful and that he keeps sending threatening the complainant Dorcas through other inmates from Kenyenyia who have been released. That the community and the victims are not ready to receive him at the moment and that his long stay in prison will neutralize the bhang in his body and become a good person.

8. The matter was placed before this court as a matter to be considered for revision. It is therefore not an appeal nor a matter for resentencing. The appellant/applicant has moved this court under Article 133(1) of the Constitution. Under the said Article a petition has to be made and the President may exercise a power of mercy in accordance with the advice of the Advisory Committee.

9. This court lacks the jurisdiction to exercise a power of mercy as sought. That is the prerogative of the President. Sections 19 and 20 of the power of Mercy Act provides for the Eligibility to file a petition and how the petition is filed.

10. As already stated what is before me from the facts deponed and the appellant's submissions is that he seeks to have his sentence revised. Revision is provided for under section 364 of the Criminal Procedure code. The applicant was convicted on his own plea of guilty. The offence of attempted arson carries a sentence of 11 years if one is found guilty. The applicant was sentenced to 7 years. He attempted to set

on fire the building a dwelling house of Joash Otara Singa. The sentence for one convicted for malicious damage is 5 years. He was sentenced to 5 years which is the maximum sentence.

11. From the court record he pleaded guilty. 5 years for the charge of malicious prosecution was quite excessive. I review the sentence from 5 years to 2 years. He was sentenced to 7 years for attempted arson. The report tendered on the appellant is not favourable. He is what one would call a bad boy. He still issues threats whilst in jail. In my view I find no good cause or reason to revise the sentence of 7 years. I decline his request. The only sentence that is revised is that of malicious damage, the 5 year jail term is reduced to 2 years. The sentences shall continue to run concurrently. It is so ordered.

**Dated, signed and delivered at Kisii this 1<sup>st</sup> day of November 2019.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Applicant In person**

**Mr. Otieno Senior Prosecution Counsel office of the DPP**

**Ms. Rael Court Clerk**