



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 80 OF 2019

HAMISI OMAR DENG.....**PETITIONER**

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....**RESPONDENT**

JUDGMENT ON RESENTENCING

1. The Petitioner herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in Mombasa High Court. The information that formed basis of the charge are that on 4/3/2008 at Kwale he murdered one Kwale Dengo Mwatsumi.
2. The Petitioner having exhausted his appellate chances is now before this Court for resentencing pursuant to the decision of the Supreme Court on **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, in which the Apex Court stated that the mandatory nature of the death sentence is unconstitutional.
3. Mr. Fedha, learned Counsel for the State submitted that the Petitioner using a panga and stone killed one Kwale Dengo Mwatsumi. He attacked and assaulted the deceased with fatal consequences. The deceased and the Petitioner were brothers.
4. Mr. Fedha submitted that the Petitioner is entitled to resentence based on **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. He further stated that the offence of murder is serious once proved and should be punished accordingly. Through acts of the Petitioner a person lost his life, while others lost a father and husband. In **Ramadhan Kombe v Director of Public Prosecutions [2019] eKLR** the Petitioner therein was charged with the offence of murder. He murdered his two children and viciously attacked his wife. The court on resentencing sentenced him to 29 years' imprisonment.
5. The Petitioner herein killed his brother, by hitting him with a stone and then cutting him with a panga. That was a cruel and vicious attack which cannot go unpunished. Considering the circumstances of the case and the cited authorities the learned Counsel prayed that the Petitioner be sentenced to 30 years' imprisonment to run from the date of his arrest.
6. In mitigation the Petitioner stated that the deceased was his younger brother and that the fight was ignited by a political argument since he was supporting another party contrary to his brother's party. Furthermore, they were both drunk and therefore under the influence of alcohol (their local brew commonly called mnazi) and that the fight was not planned and he did not intend to cause death but to discipline the brother. After the incident he took his brother to Msambweni hospital with the help of two of his sons where the deceased received treatment and returned home. After two weeks unfortunately the deceased succumbed to death as a result to injuries sustained during the fight.
7. The Petitioner further submitted that he is reformed and rehabilitated for the last 14 years he has been in custody. He is very remorseful for the offence which was not planned but was due to intoxication after a long period of time they spent drinking.
8. The Petitioner further stated that they are only two brothers and six sisters who are all married away from his home area. The family at home is left without a father figure, only the widow of his late brother and her five children plus Petitioner's four wives and 19 children who are now orphans. The Petitioner is 79 years old and living under the mercy of the Lord's bonus and requests that the Court be lenient to him and let him go home and give the inheritance of land to his sons who are eagerly awaiting for their share. The Petitioner states that he is ailing with high blood pressure and anemia.
9. The Petitioner prior to his arrest was a drunkard but has since reconciled with his maker and have proved to be a good example to his fellow inmates and fellow officers and offers prayers and worships at the mosque. The Petitioner is working under metal section making mats and other materials having undergone the vocational training offered in custody.
10. The Petitioner prays that the Court sets him at liberty. The Petitioner also prays to benefit of the least severe prescribed sentence and

used the authority of **Gilbert Wanami Kisiangani v Republic HCCR App. No. 39/2017 Mombasa eKLR** where the Appellant was sentenced to serve 10 years and the issue of Appellant's intoxication and state of mind was extensively addressed therein and that he was a first offender.

11. I have carefully considered the Petition. The Petitioner was convicted for the murder of his own brother, and was sentenced to 30 years in prison by the High Court. Upon his appeal to the Court of Appeal, the same was enhanced to death, because that was then the prescribed sentence for murder. The Petitioner, under the then prevailing Constitution, could not mitigate. Even if he did, mitigation was then of no real substance because the same could not diverge the cause of the sentence as provided in the law. The aforesaid case of Muruatetu has now breathed life into the law, with the result that even in cases of murder, mitigation counts for something, and adds value to the justice process.

12. The Petitioner here murdered his own brother after a quarrel in a beer joint. They were only two brothers. One is dead, one is in jail. There is no father figure in the Petitioner's family. The responsibility for his brother's widow, and his late brother's five children, lies with the Petitioner, in addition to that for his four wives and his 19 children.

13. The Petitioner has served 14 years in jail. He is 79 years old. His case makes a serious mitigation for consideration by this Court. However, the offence that the Petitioner committed must be properly punished and atoned for. After making a serious consideration of the matter, and after taking into account the Petitioner's moving mitigation and especially his age of 79 years, and after considering the aggravating circumstances stated by the prosecution, I am satisfied that the Petitioner deserves to be resentenced. The High Court had initially sentenced the Petitioner for 30 years at a time when mitigation really served no purpose. After hearing the Petitioner's submission on mitigation, and in the light of everything I have stated herein, I sentence the Petitioner to serve a term of 20 years from the date of his arrest. That is the Judgment of the Court.

13. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH,

2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha for DPP

Ms. Peris Court Assistant