



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 131 OF 2019

SIDI GONA KOMBE.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner and 4 others were charged and convicted with two offences of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the offence were that on 22/12/2011 at Lango Baya Village within Kilifi County, they jointly murdered Charo Kitsao Gona and Riziki Mbogo.
2. On 22/12/2011 the Petitioner and others picked the deceased from their homes on allegation that they were practicing witchcraft. They were to take the deceased to District Officer's Office. However, along the way they killed the two deceased hence the charges.
3. The Petitioner was tried for murder, and was sentenced to serve 25 years in prison. This sentence was confirmed by the Court of Appeal.
4. The Petitioner is now in this Court seeking to have her sentence reduced, and further that she be released to serve the reduced term on probation.
5. The Petitioner avers that she was sentenced to a period of 25 years' imprisonment. With remission pursuant to Section 46 of the Prison Act (Cap 90 Laws of Kenya), the Petitioner would then serve a period of 17 years. The Petitioner has already served 8 years since arrest and has 9 years to go; the Petitioner requests the Court to consider her to a non-custodial sentence as was done in **James Kazungu Luganje v Republic HC No. 128 of 2018 at Mombasa** decided on 30/3/2020 where Justice E. K. Ogola held:

“The petitioner has already served 11 years in prison. I have considered all the circumstances of this case and especially the altitudes of the families involved in the matter and all other mitigating circumstances. Having done that I make the following orders:

i. I hereby set aside the death sentence imposed on the Petitioner by the trial court.

ii. Instead thereof I jail the Petitioner to a total of sixteen (16) years, 5 of which are hereby suspended to be served in probation.

iii. The Petitioner to observe the probation terms, and should not engage in any mischief during probation. If he does he shall be arrested and taken back to prison to complete his sentence.

iv. The Petitioner shall forthwith be released unless lawfully held.”

6. **M/S Wanjohi**, the learned prosecutor submitted that this Court lacks the jurisdiction to interfere with the sentence that was given by the trial Court and confirmed by the Court of Appeal, and that in this case the Petitioner was not given the mandatory death sentence.
7. In my view, and in concurrence with the learned prosecutor's submissions, this Court lacks the jurisdiction to interfere with the sentence imposed by the Court.
8. Despite the law providing the mandatory sentence of death for charge of murder the trial Court considered the Petitioner's mitigation and sentenced er to 25 years which has since been reduced to 17 years in accordance with Section 46 of the Prisons Act. Taking into account that

through the conduct of the Petitioner two people lost their lives, the circumstances of the case and the fact that the trial Court took into consideration the Petitioner's mitigation the prosecution prays that the petition be dismissed as the Petitioner has already benefitted under Francis Muruatetu case.

9. Further, killings of people in Kilifi County on allegations of witchcraft is very rampant. This is something which was recognized by the Appellate Court hearing the Petitioner's appeal. **Criminal Appeal Nos. 33, 34, 35 and 36 of 2016 – James Charo & 4 others v Republic**. The Appellate Court stated at paragraph 35:

“In view of the prevalence of murders of persons branded as witches in this area, we feel the sentence by the learned Judge was justified and there is no basis for us to interfere with it.”

10. In the upshot the petition is dismissed for lack of merit.

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

Ms. Wanjohi for DPP

Ms. Peris Court Assistant