



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 114 OF 2018

GIDEON KAMAU MBURU.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Murder contrary to Section 203 and 204 of the Penal Code and sentenced to death in Mombasa HCCR Case No. 07 of 2003. He appealed in Criminal Appeal. No. 177 of 2008. The appeal was dismissed and sentence upheld.

2. The Appellant has now petitioned this court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another vs. Republic SCK Pet. No. 15 of 2015 [2017] eKLR*.

Brief Circumstance of the offence

3. The particulars are that on 15th April, 2002 at about 11 p.m. the Petitioner together with another shot dead John Kamau Muhika. The deceased's wife Mary Njeri Kmau who was in their house had responded to the hooting of the deceased's car and went out to open the gate accompanied by their house girl Eva Tadei when she saw three men coming in after the deceased, with one of them holding a gun who cocked the gun and fired two shots from the rear of the car and shot the deceased in the head and chest whereby he later died as a result of the injuries

4. The Petitioner submitted that the Death Sentence which was commuted to life imprisonment is unconstitutional. He has now exhausted his right of appeal and approaches this court to declare that the death sentence is unconstitutional and contrary to Article 50(1) and Article 25(a) of the constitution and impose an appropriate sentence upon him.

5. He further submitted that the court did not consider his mitigation as he is a first offender and has never been accused of breaking the law. He submitted that he was very remorseful.

6. The Petitioner submitted that he was sentenced at the age of 40 and he is now 59 years; that he has learnt trade that will help him in the society, has parental responsibilities, a wife with three children who were present in court. He further prayed that he be jailed for the period of time served as a sentence.

7. The prosecution submitted that a jail term of 40 years would be adequate punishment for the crime.

8. I have considered the Petition as well submissions of the parties. On the issue of sentencing the Petitioner submitted that he has reformed. This is evidenced by the Prisoner's Progress Report. Indeed, he may have reformed and may even have been rehabilitated going by the responsibilities he carries on in prison. However, the element of retribution must be seen to be evident. The society expects sound policy judgment from the courts. A person who has been convicted of a crime must be adequately punished to achieve all the above three objectives. The court notes that the Petitioner confesses to having reformed and has served 16 years in prison, and has not broken any rules with Prison authorities. He also claims to be suffering from Diabetes and Hypertension which does not seem to be supported by the Prisoner's progress Report as it states that he is Medically fit. However, this court takes into account the fact that the Petitioner shot dead the deceased at point blank range at the deceased gate. This act must be severely punished.

9. In conclusion, and in consideration of the facts here, this court replaces the death sentence herein, and hereby sentences the petitioner to serve a jail term of forty (40) years from the date of arrest.

That is the Judgment of the court.

10. Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 30th day of March, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant