



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 144 OF 2018.

JOSEPH KIEMA MUTHOKA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

JUDGMENT

1. This is Judgment for the undated petition filed on the 15.05.2018 by the Petitioner seeking for resentencing. The grounds for the Petition are clearly motivated by Supreme Court of Kenya's decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* where the Court held that mandatory death penalty for murder is unconstitutional.
2. The Petitioner was charged and convicted with the offence of Murder contrary to Section 203 as read with Section 204 of the penal code. The trial court convicted the Petitioner and sentenced him to suffer death. Petitioner appealed to the court of Appeal and the appeal was dismissed. As it stands the Petitioner is serving a life sentence after his death sentence was commuted.
3. The particulars were that on 30/9/2007 at Taita District the Petitioner used a knife to kill the deceased by stabbing her on the neck and stomach.
4. The Petitioner filed submissions in support of his petition. He submitted that the imposition of a mandatory death sentence was arbitrary and unconstitutional and denial of his rights enshrined under Article 25(c) and 50(2) of the 2010 Constitution. In support of his argument the Petitioner relies in the *Francis Muruatetu* case (supra). He submitted that the trial court did not consider his mitigation and appeals to this court to consider the same. It is the Petitioner's case that he is very much remorseful of his actions and that he has reformed during the eleven (11) years he has been in custody. He adds that he has acquired skills while in prison that will assist him in the society if given a chance.
5. The State opposed the petition on grounds espoused on its submissions dated 26.8.2019 and filed on 26.08.2019. The State submitted that the Petitioner was armed with a knife which he used to kill the victim by stabbing him on the neck and stomach. According to the state, the Petitioner had time to plan for the offence. The State submitted that a deterrent sentence of 40 years including the 11 years served would be adequate punishment.
6. I have considered the submissions. The principle in sentencing is that the Court should take into account the mitigation offered by the Petitioner, the facts of retribution, rehabilitation and reformation. The court should ask itself whether the Petitioner is remorseful, and has sufficiently been rehabilitated and reformed to reasonably be expected to assume life in a free and orderly society. The Prison Progress Report filed for the Petitioner speaks well of him; that he is a church elder; that he has attained the position of Elder in prison; that he is of good character, and so on.
7. A probation report was also filed dated 23.9.19. It also recommends release of the Petitioner.
8. On the issue of sentence, this court is bound by the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR* as affirmed by the Court of Appeal in *Wycliffe Wangusi Mafura vs. Republic [2018] eKLR*. To that extend this court has the jurisdiction to resentence the Petitioner.
9. I have considered the mitigation by the Petitioner that he is a first time offender; that he has acquired skills which he can use to benefit the society and that he is very remorseful of his actions. I considered the Prisoner's progress report which indicates that the Petitioner has been of good discipline for the time spent in prison and that he has acquired two diplomas; diploma in bible discover and diploma in health. I have also considered the probation report which indicates that the Petitioner is currently 63 years and has served 12 years in prison. The family of the petitioner is willing to re-integrate with him.
10. I have also considered the aggravating circumstances in this case. This court finds that the crime committed by the Petitioner was so

grave and caused death to an innocent person. That crime must be met with adequate punishment to send a clear message that crime does not pay and shall be heavily punished once established.

11. This court has noted, however, the fact that the Petitioner is of good character and is clearly reformed. It is because of these that this court hereby sets aside the death sentence imposed on the Petitioner by the trial court, and instead thereof jails the Petitioner for a term of 18 years from the date of arrest considering the age of the Petitioner.

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

E. K. OGOLA

JUDGE

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant