



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 128 OF 2018

JAMES KAZUNGU LUGANJE.....PETITIONER

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that the Petitioner on 25.01.2009 at Midodoni Village Gongoni Location within Malindi District of the Coast Province jointly with others murdered Albert Mlanda Luganje. The trial court convicted the Petitioner and sentenced him to suffer death. Petitioner appealed to the Court of Appeal vide Malindi Criminal Appeal No. 39 of 2011. The appeal was dismissed and as it stands the Petitioner is serving a life sentence after his death sentence was commuted.

2. This petitioner now seeks for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex court found the mandatory death sentence to be unconstitutional. The petitioner submitted that the mandatory death penalty under Section 204 of the Penal Code violates his right for fair trial under Article 50 of the Constitution. According to the Petitioner Articles 19, 20, 26, 27, 28, 29 and 48 of the Constitution have been violated by Section 204 of the Penal Code to his detriment. On this line of argument the Petitioner relies on the case of **Geoferey Ngotho Mutiso –vs- Rep CR.APP NO 17 OF 2008**.

3. The Petitioner argued that the trial court did not consider his defence of provocation on account of witchcraft and that he committed the offence in anger. He relied on **Mohamed Tawa Keya, William Juma Shauri & Another –vs- Rep CA CR APP NO. 45 OF 2015**. The petitioner also urged this Court to consider his mitigations that he has undergone through numerous rehabilitation programs and indeed attained a grade D in the KCSE; he has completed various theological courses aimed to ensuring that he refrains from all undesirable interactions in the course of serving his sentence. It is also submitted that there is a recommendation by the power of mercy Advisory Committee through the Commissioner General of Prisons in favour of the Petitioner confirming his reformation.

4. Mr. Fedha, learned counsel for the State opposed the petition and submitted that the Petitioner should be subjected to a definite sentence of 40 years including the 10 years already served in prison because the offence the petitioner committed deserves deterrent sentence.

The Determination

5. I have considered the petition and the principles guiding the court in sentencing. Pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, and as confirmed by the Court of Appeal in **Wycliffe Wangusi Mafura vs. Republic [2018] eKLR**, this Court has the jurisdiction to resentence the petitioner herein.

6. 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 for his actions. I have also considered the Prisoner's Progress Report dated 12/3/2019 which indicates that the Petitioner has been relating well with other inmates for the time spent in prison and that he has acquired personal skills while in prison; that he has sat for K.C.S.E and attained grade D; and that while in prison he is deployed in the prison teaching section as a geography, business studies and social studies teacher. I have also considered the social inquiry report which indicates that the Petitioner is currently 36 years and has served 10 years in prison. The family members of the petitioner are willing to re-integrate with him.

7. I have also considered the aggravating circumstances in this case. The petitioner participated in the murder of the deceased together with others on the belief that the deceased was a witch. This is a serious crime which is prevalent in the Kilifi County and which must be punished. The probation reports filed in court shows that the family of the deceased has forgiven the petitioner, and both the deceased's family and that of the petitioner are willing to receive the petitioner back home.

8. The petitioner is also sickly. There is a letter dated 14th March, 2019 by Dr. Mohamed Ali Mohamed medical officer at the Coast Provincial General Hospital confirming that the petitioner suffers from arthritis.

9. 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.

10. Right of appeal in 14 days.

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