



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 18 OF 2018.

PETER MOTE OBERO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

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 13.04.2002 at Maweni Village near Taita Taveta town at around 11pm together with others murdered John Kamau Mukuhu by shooting him twice on the forehead and chest while he was in his car. The trial court convicted the Petitioner and sentenced him to suffer death. Petitioner appealed to the court of Appeal *vides* Mombasa Criminal Appeal No. 177 of 2008. The appeal was dismissed and as it stands the Petitioner is serving a life sentence after his death sentence was commuted.

2. This petition seeks for resentencing of the petitioner following his conviction for murder in **Mombasa High Court Criminal Case No 7 of 2003 Republic vs. Peter Mote Obero and Gideon Kamau Mburu**, on the ground that the petitioner was sentenced to death for the offence of murder on 31st May, 2007, which sentence, according to the petitioner, was unconstitutional as espoused in the **Francis Karioko Muruatetu vs. Republic SC Pet 15 &16 of 2015**.

3. The Petitioner filed written submissions in support of his petition. It is submitted that the Petitioner's rights under Article 50(1)(2)(q) of the constitution were violated because his mitigations were not considered by the trial Court. The Petitioner contends that by not considering his mitigation submissions the trial court skipped a vital stage before sentencing him and the same is prejudicial to him. In support of his argument the Petitioner relied on the case of **Francis Muruatetu** (*supra*) and in **Republic vs. Thomas Patrick and Another [2009] KLR**.

4. The Petitioner submitted that his constitutional rights under Articles 20, 21, 22, 28 and 50 were breached and contravened by the respondent due to the continued detention in prison. The Petitioner further submits that Article 28 of the Constitution provides that every person has the right of dignity and the right to have that dignity respected and protected. The death penalty violates that right.

5. It is also the Petitioner's cases that he has learnt certain skills in prison including electrical wiring. He has been in prison since 2002, sufficient time to atone for his crime. The Petitioner submitted that his family is willing to re-unite with him. He further submitted that his health is at stake because he suffers from high blood pressure and diabetes.

6. Mr. Fedha, learned Counsel for the State opposed the petition and filed his submissions on 9.9.2019. It is submitted that the Petitioner was armed with a gun and shot the deceased. Mr. Fedha submitted that the Petitioner has served 16 years in prison and due to circumstances surrounding his charge, Counsel submitted that the Petitioner be sentenced to serve 50 years including the years already served.

7. I have considered the petition and the principles guiding the court in sentencing. I will begin by stating that the Supreme court in **Francis Kariokor Muruatetu & Another vs. Republic** did not declare the death penalty unconstitutional. It only outlawed its automatic imposition on capital offences (murder, robbery with violence and treason), upon conviction in respect of those offences. As a result, trial courts now have the discretion to impose a death penalty in deserving cases. They also have discretion to impose other forms of sentences including imprisonment and monetary fines in appropriate cases.

8. The thrust of the Petitioner's case is that he was not allowed to mitigate before the death sentence was imposed and that he is in an ill health condition.

9. In **Wycliffe Wangusi Mafura vs. Republic [2018] eKLR**, the Court of Appeal interpreted the Supreme Court decision in Muruatetu case to favour resentencing hearings. The court stated:

“We also said in William Okungu Kittony's case that the decision of the Supreme Court in Muruatetu's case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly since this appeal had not been finalized, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.”

10. This court therefore has the jurisdiction to hear this petition on resentencing. Having considered the mitigation by the petitioner and the circumstances of the offence, the only issue now for this Court is to determine the appropriate sentence. I have also considered the aggravating circumstances in this case. The petitioner killed the Complainant's husband. This court finds that the crimes committed by the Petitioner were 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. For the foregoing reasons I hereby set aside the death sentence imposed on the Petitioner by the trial court. Instead thereof I jail the Petitioner for a term of forty (40) years from the date of arrest.

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