



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**Petition No. 54 Of 2019**

**(Consolidated with Petition No. 118 of 2019)**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF: OF: ARTICLE 22(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION**

**BETWEEN**

**1. TSUMA GEREZA MSITI**

**2. MWINZANGU MSAUDI MRIBE**

**3. MAJIMBO NGALANI.....PETITIONERS**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The Petitioners were tried and convicted of the offence of Murder in Mombasa High Court Criminal Case No. 27 of 2009 and sentenced to 50 years in prison. They appealed to the Court of Appeal which dismissed their appeal on 11/5/2017.

2. The have now come to this court to seek resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**.

3. Facts giving rise hereof are that on the night of 30<sup>th</sup> June, 2009 the deceased and his second wife, Kadhi Khadija (Khadija) and their three children aged between 7 years and 1 month went to their farm for night vigil against wild animals that were destroying their crops. They had a temporary shed on the farm which was away from their homestead. After having dinner Khadija remained behind with the children in the temporary shed while the deceased went out to chase the animals. At about 8 p.m. three men came to the temporary shed demanding to see the deceased. Khadija gave them seats as she went to fetch the deceased. Upon Khadija returning with the deceased the three men, who were shortly joined by two others, without any provocation attacked the deceased with clubs and panga, inflicting very severe injuries leading to his immediate death. Khadija was able to escape and returned home safely with the children. After informing her co-wife of the attack, they both made a report to the village chairman, who in turn reported it to the police. They went to the scene in the company of the police and found the deceased dead. Because Khadija had recognized one of those involved, as the 1<sup>st</sup> Petitioner herein, he was arrested immediately and through him the rest of the Petitioners were also apprehended and subsequently charged jointly as explained.

4. However, Ms. Mutua learned counsel for the prosecution raised, rightfully in my view, the objection that this court has no jurisdiction to entertain this petition for purposes of resentencing because the trial court had already sentenced the Petitioners to 50 years which sentence

was confirmed by the Court of Appeal. The Petitioners were not sentenced to death to warrant a resentencing pursuant to the aforesaid Muruatetu case.

5. It is the finding of this court that this court cannot interfere with the sentence of the High Court and the Court of Appeal. The result is that this petition lacks merit and is dismissed. The Petitioners shall serve the full sentence as decided by the trial court and confirmed by the Court of Appeal.

That is the Judgment of the Court.

**Dated, Signed and Delivered at Mombasa this 30<sup>th</sup> day of March, 2020.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Ms. Mutua for DPP

Petitioner in person

Mr. Kaunda Court Assistant