



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 83 OF 2018

IN THE MATTER OF: AN APPLICATION BY JUMA MZURI CHOVI UNDER SECTION 22 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 2(6), 20(3), 20(4), 25, 26, 28, 29 AND 50 OF THE CONSTITUTION OF KENYA, ARTICLES 6(1) & (2) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ARTICLEOF THE AFRICAN CHARTER ON PEOPLE'S AND HUMAN RIGHTS

BETWEEN

JUMA MZURI CHOVI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein, Juma Mzuri Chovu was convicted of offence of murder contrary to Section 203 as read together with Section 204 of the Penal code. He was sentenced to suffer death vide Judgment delivered on 29th February, 2008.
2. The death sentence was confirmed by the Court of Appeal vide their Judgment delivered on 23rd January, 2009.
3. Following the decision of the Supreme Court in the now famous Francis Muruatetu case which outlawed mandatory death sentence, the petitioner has petitioned this Court for a re-trial on sentencing. So this Court's jurisdiction is limited only to the issue of sentencing. The Petitioner murdered his own wife and ran away from home. Upon trial and conviction, he has now served fifteen (15) years in prison.
4. **Mr. Wameyo** learned counsel for the Petitioner submitted that in exercising its discretion on whether to sentence the offender to death or not the Court is not confined to a list of predetermined special extenuating circumstances. As was observed by Contch CJ in **Republic vs. Reyes**:

“The need to have regard in the exercise of discretion whether to sentence an offender to death or life imprisonment would therefore, I think, preclude a list of pre-determined special extenuating circumstances.”

Having the foregoing in mind, Mr. Wameyo drew the Court's attention to the following factors for consideration by this Court in the instant case:

1. Type and gravity of the murder
2. Lack of premeditation
3. Character of the petitioner
4. Remorse

5. Capacity for reform and continuing dangerousness

6. Delay up until time of sentence and prison conclusion.

5. Mr. Wameyo submitted that this was a crime of passion. The deceased was the petitioner's wife. It was not something that the Petitioner had intended or planned. The crime was not exceptionally grave or heinous. It was committed in the heat of an argument between spouses. It was unfortunate but definitely not intended. Mr. Wameyo submitted that the appellant is not guilty of lengthy premeditation or pre-planning. There was no evidence on record to even suggest this. Counsel submitted that malice aforethought does not necessarily imply significant premeditation. Given that there are varying degrees of premeditation, Mr. Wameyo submitted that lack of any long pre-meditation or pre-planning should count as a strong mitigating factor and in this instance in the petitioner's favour.

6. On character, Mr. Wameyo submitted that the Petitioner has boasted of past good character. He had not been involved in any crime before. Counsel implored the court to take into account the Petitioner's good character. The Petitioner during the hearing of this case presented certificates and other commendations that he has won while in prison all of which point at a man of good character. Mr. Wameyo submitted that his killing of his wife certainly was out of character.

7. Mr. Wameyo further submitted that the Petitioner is quite remorseful. He has to live with the guilt of being the cause of his wife's death. It is not a past that he is proud of. He has suffered and continues to suffer from this guilt. He is extremely remorseful and if it was possible to turn back the clock, he would certainly not commit the same crime. Counsel submitted that the Petitioner is now reformed going by the various certificates that he was awarded and the picture that the same generously paint of his character. It is quite unlikely that he will commit such an offense again. There is no evidence on record to suggest that he retains a capacity for continuing dangerousness.

8. Mr. Wameyo urged the Court to consider the number of years that the Petitioner has been in remand and prison. Counsel submitted that this Court has on many occasions accepted delay as a very significant mitigating factor. There is a growing body of authority that any significant delay in the trial or appellate process should lead to a reduction of sentence. Counsel urged the Court to release the Petitioner considering the number of years that he has already served. Mr. Wameyo submitted that the Petitioner is in good and constant touch with members of his family. If released, he would be accepted back into society. His release would in the circumstances not pose any danger to his person.

9. Mr. Isaboke learned counsel for the Director of Public Prosecutions submitted that given the gravity of the offence of murder meted to his own wife, the Petitioner should be sentenced to twenty (20) years in prison. Mr. Isaboke further submitted that five (5) years of the said twenty (20) years be commuted or suspended and that if the same is granted the Petitioner be released forthwith from prison.

10. I have considered these submissions. I have also noted the Progress Report filed by the prison dated 19th February, 2019. The said report speaks well of the Petitioner; that he has reformed; that he is a prayer leader in prison; that he also takes care of the elderly in prison; that he is responsible and remorseful of what he did and that he has changed and reformed. The report further states that the Petitioner has achieved the highest level of tailoring (Grade One) and dress making (Grade One). He is hard working, disciplined and a team leader.

11. The above are good attributes. However, they do not mitigate the gravity of the offence. They would not of themselves reduce the gravity of the offence. I have nonetheless taken them into account. I have specifically considered the medical condition of the Petitioner who suffers hypertension and peptic ulcers and needs constant medical care. I will accept the submission of the prosecution that the Petitioner be sentenced to twenty (20) years five (5) of which be suspended.

12. Accordingly, therefore, I herewith sentence the Petitioner to a prison term of twenty (20) years five (5) of which are hereby suspended. During the period of suspension, the Petitioner shall not commit any criminal offence. If the Petitioner shall be charged with a criminal offence then the suspended sentence shall automatically become servable, and the Petitioner shall be arrested and taken to Shimo La Tewa Prison to serve the said suspended sentence, in addition to any other sentence lawfully given.

13. Further, during the period of suspension, the Petitioner shall report to the Officer Commanding Station (OCS) of Changamwe Police Station on 1st June, and 28th of December of every year commencing on 1st June, 2019.

14. In summary orders are issued as follows:

i. The Petitioner is sentenced to twenty (20) years in prison.

ii. Five (5) of the said twenty (20) years are suspended.

iii. Petitioner not to commit any offence during the suspension of sentence.

iv. Should the Petitioner be charged with any offence the said suspension will automatically cease and the Petitioner will be arrested and taken to the Shimo La Tewa Prison to serve the full sentence in addition to any other lawful sentence given by any Court.

v. The Petitioner shall report to the OCS Changamwe Police Station every 1st of June and 28th of December of every year during the suspension with effect from 1st June, 2019.

vi. The Petitioner is henceforth released from prison unless lawfully held.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 30th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Isaboke for DPP

Ms. Omboga holding brief Wameyo for Petitioner

Mr. Kaunda Court Assistant