



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 29 OF 2018

(Originating from Criminal Case No. 5 of 1998 in the High Court at Mombasa

and Criminal Appeal No. 88 of 2003 in the Court of Appeal at Mombasa)

JOHN NDEGWA NJUGUNA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The petitioner together with another person were convicted for murder contrary to section 203 as read with section 204 of the Penal Code. He was sentenced to death. He lost appeal on the conviction and sentence and has served jail term of 22 years. The petitioner is now in this court for resentencing pursuant to the Supreme court decision in *Francis Karioka Muratetu and Another vs. Republic [2017] eKLR* in which the apex court declared mandatory death sentence unconstitutional.
2. The circumstances giving rise to conviction were that the petitioner together with another killed the deceased, Ingerborg Escoffey Wiesner, who at that time lived together with the petitioner either as a girlfriend or other. It appeared that the intention of the murder was to take away the deceased's Nissan Matatu KAD 313X which the deceased had bought for Ksh 350,000. The couple lived in Ukunda.
3. The prosecution has submitted that the petitioner be jailed for forty years as the murder was gruesome and was carried out in a most painful way using a vehicle break disk to cut the deceased's throat.
4. On his part the petitioner submitted that he regrets what he did to his own wife. He states that he is already reformed, and rehabilitated. He lives a life of responsibility in prison. He is an Elder of the Seventh Day Adventist Church in the prison and teaches lesson and fundamental beliefs. The Progress Report from prison speaks of a very reformed person, and recommends his early release on account of such responsibility.
5. The petitioner's mitigation is very colourful, the SDA Church, the local administration as well as the prison department have recommended his early release. The Social Inquiry Report states in part as follows –

“The victim in this matter was his wife. The couple is said to have been relating well to each other and renewed their marital vows by visiting their relatives to cement their relationship.

Unexpected marital quarrel ensured one night that resulted in a heated exchange of words and later on fists and blows, the deceased being a female was overpowered and finally hit by a blunt object, on the head she collapsed instantly, bleeding profusely. The neighbours came to her rescue following her cries, rushed her to hospital. She later died while undergoing treatment. The lifer was arrested and charged with the offence.

RECOMMENDATION

My Social Enquiry has positively identified itself with the lifer. His significant others, neighbours and the administration speak positively about him and conquer that the incidence was a mere bad luck and therefore regrettable. The life is indeed missed at home to fill the vacuum left behind by their late parents. Having taken over the mantle of the family, following the demise of their parents, thus his siblings, dearly miss him, as the father/mother figure, at home.

Public opinion is that the lifer is repentant. The routine visits have positively awakened him, he is now born again and remains focused. The likelihoods of being emotional and temperamental are ruled out, he has learnt a lesson and therefore chances of recidivists are nil. Local leaders and administrators are not opposed to his release.”

6. The petitioner was 23 years at the time he committed the offence. He is now 44 years and says that he has learnt professional trade in prison and will be useful in the free society and pleads to be sentenced for the 23 years he has served.

7. I have considered the submissions of the parties. In my view the purpose of sentencing must be observed in every sentence meted out. These include whether there is retribution, rehabilitation or reformation. The petitioner, according to the record before the court, is highly recommended for an early release. He is a prisoner who has shown both remorse and responsibility. It is the duty of the court to give a chance to those who show remorse and demonstrate it. I accept the recommendations of the Social Inquiry Report, to give a chance to the petitioner. The petitioner has served 22 years in prison. That is not enough time to atone for one's death. However, no one can recall time. In fact no amount of time in prison is enough to compensate for a life lost.

8. Under the circumstances, it is my view that the petitioner be allowed to use the skills he has acquired in prison, including counselling and preaching to prisoners, but from out of the prison.

9. This court therefore jails the petitioner for a total period of twenty-seven (27) years. However, three (3) years will be served in probation, with the result that the petitioner will only spend one (1) more year in jail as from the date of this Judgment the three (3) years to be served on probation on condition that:

(i) The petitioner shall report to the nearest police station twice a year, on 2nd of January of every year and on 2nd of July every year, commencing on the applicable date after the release.

(ii) If the petitioner shall commit any offence, he shall be arrested where upon he shall serve the entire 27 years behind the bar.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 30th day of October, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant