



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 25 & 27 2018 (CONSOLIDATED)

ALI NGUMBAO BAYA.....1ST PETITIONER

KAZUNGU MAE MWARINGA.....2ND PETITIONER

KAHINDI GUMBAO.....3RD PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the State

RULING

The three Petitioners namely Kazungu Mae Mwaringa, Ali Ngumbao Baya and Kahindi Gumbao were on the 12th of April, 2008 charged and arraigned before this court with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that the three offenders jointly murdered one Kahindi Kombe Yeri on or about 16th and 17th of December 2004 at Kakoneni Village, Jilore Location in Malindi District with Coast Province (as it then was).

All the Petitioners pleaded not guilty, they were tried, found guilty, convicted as charged and sentenced to suffer death on the 29th October, 2010. The Petitioners then filed an Appeal to the Court Appeal which was dismissed for lack of merit. They have filed separate Petitions which this Court have consolidated seeking to be re-sentenced following the recent jurisprudential development in respect of sentencing brought by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Republic (2017) eKLR**. In the case the apex Court pronounced that mandatory aspect of death sentence was unconstitutional as well as the commutation of such sentence to life imprisonment by an administrative fiat.

The Supreme Court in **Muruatetu Case** condemned of the mandatory nature of death sentence enshrined in the penal code advancing the argument that it deprives the Courts of the discretion to take into account the aggravating and mitigating factors to allow the judges to mete proportioned and appropriate sentences based on the individual circumstances of each case.

Furthermore, in para 48 of the above-cited decision, it is propounded that where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform under the Article 25 of the Constitution; Thus, this Petition is before this court mainly because when the Petitioners were convicted and sentenced to suffer death, the mandatory nature of death sentence had not yet been declared constitutional.

It is evident that the trial process does not stop at convicting the accused and sentencing is a crucial component of sentencing. Mitigation is an important congruent element of the fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. (see **Muruatetu Case**). The foregoing means that the Petitioners herein were not accorded their fundamental right to mitigate.

Submissions

The Petitioners filed submissions (mitigation) on 11th February, 2019 to support the instant petition. The Petitioners basically contends that the death sentence imposed on them was unconstitutional. That the court ought to consider the period already served in custody. That they were the only breadwinners for their elderly mother who is now suffering, that they have taken several rehabilitative and reformative

programs and that they are all first offenders.

In addition to the above, the 2nd Appellant asserts that he did not play a direct role in the commission of the offence and he urged the court to take into account his age which was 22 at the time the crime was committed. I have considered these submissions in-depth and they I shall take the same into account in my analysis.

The Respondent's Preliminary Objection

The DPP filed preliminary objection contending that the petition is premature and this Honorable Court cannot at the moment handle the issue of re-hearing of the sentence and as such it should be dismissed. Reliance was placed on placed on **Muruatetu Case (supra)** in terms of para (c) which states that

“(c). that the Attorney General, the Director of Public Prosecutions and another relevant agencies shall prepare a detailed professional review in the context of this Judgement and order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein; the Attorney General is hereby granted twelve (12) months, from the date of this Judgement to give a progress report to this Court on the same.”

It's therefore the DPP's position that the Court should await the presentation of progress report to the Supreme Court which will set out the framework for handling such related matters.

Findings, Analysis and Determination

I shall start with the preliminary objections raised by the Director of Public Prosecutions. I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15th March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in **William Okungu Kittiny v R [2018] eKLR** expressed itself as follows;

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”

In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and resentence those that were convicted with capital offences whose sentence was mandatory death sentence. The Court of Appeal decision in **William Okungu Kittiny(supra)** is legally binding upon this Court.

The sequence of events leading to the death of the deceased are quite unfortunate. The deceased was collected from his homestead by a group of villagers who claimed that he had bewitched Karemba who was sick. The Petitioners were part of the group that brutally ended the deceased's life. It is said that they went to his house and ordered him to come out of the house or else they would burn him alive. It is said that the said group marched the deceased stark naked and they announced that they were taking him to the chief place. On the way to the chief's home, the deceased was brutalized by the members of the group which culminated into his death.

This court requested for resentencing report which was duly filed with the court on 2nd July 2019. I have taken all the resentencing reports into account. The 1st Petitioner was a young man of 22 years when he committed the offence while the 2nd Petitioner was 44 years and the 3rd Petitioner was 41 at the time of the commission of the offence. The 1st Petitioner according to the report doesn't have any known criminal record, that he is remorseful and regrets the events and the consequences they brought. While in prison, the 1st Petitioner has repeated his KCSE examinations and scored a B-.

He has further undergone training in several fields including: alternative to violence- he is a trainer, a diploma in bible studies, a certificate in bible series, certificate on paralegal, alpha course training and a certificate of appreciation (mathematics teacher).The 1st Petitioner has also been indicated to be disciplined, highly respectful and helpful to his fellow inmates. The report recommended a reduced sentence to the period already served.

The 2nd and the 3rd Petitioners are both remorseful and they regret the events and consequences they brought. They prayed for a chance to be reintegrated with their families once more. Both the 2nd and 3rd Petitioners have managed a diploma in Bible studies which they hope to pursue once they reintegrate and joins the local church. They are both family man who although not with their own children, has some responsibilities to take care of, they are both first offenders with no prior criminal record. They have all made efforts to reconcile with the victim's family as well as the community they wronged. They report recommends both the 2nd and 3rd Petitioners be given a reduced sentence to the period already served.

This case stems from witchcraft related violence. Many cultures across Africa embrace traditional healers and a persistent belief in witchcraft. The African concept of a witch does not encompass the potentially being witch who, in some western countries, enjoys the status of an alternative religion. To the contrary, there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their fellow human beings. The attempts of the law to address witchcraft inspired violence differed markedly from the suppression tactics of the various legislative initiatives.

In other jurisdictions, whereas legislation acknowledges the widespread violence and seeks to curtail it, their criminal laws has often recognized the belief that gave rise to the violence and carved out a witchcraft-provocation defence that could be offered as a mitigation factor in cases of witchcraft-related violence. Under this theory, accused persons could reduce their crimes or punishments upon proof that they believed they, or persons under their immediate care, were bewitched and that this belief caused them to temporarily lose self-control.

However, that is not the case in our jurisdiction. There is no such recognition of a witchcraft provocation as a mitigation factor. The laws of Kenya criminalize all acts of witchcraft and the Witch Craft Act has provided an avenue for witch-craft related cases to be dealt with through the court process. Thus, in my view, the method used by the Petitioner herein to deal with such an issue was clearly wrong. The Petitioners put the matter into their hands and in doing so, they violated the law.

This case brings to the force the negative impact of this deep-rooted belief in witchcraft by a number of communities in our nation. In the Giriama Community for instance killing a “witch” is not merely explainable, or excusable, but praiseworthy. There are also scattered throughout this country, local and traditional leaders whose duty is to deal with cases like the one which confronted the Petitioners. The Petitioners had no right to take the law into their hands because they are not qualified or authorized to deal with the situation that they attempted to resolve.

The life of the deceased was not so cheap to be ended in the way it did and the Petitioners were expected to contained their beliefs no matter how strong they may have made been. Chaos and anarchy will enslave this country if those of the mind of the Petitioners are not adequately punished for their conduct.

In assessing the Petitioners’ sentence, I take into account the submissions made by each of the Petitioners. What I find to be particularly mitigatory is the fact that they have made amends with the deceased’s family. It shows that they are contrite. Clearly the belief in witch craft played a major role in the commission of this crime.

I have taken the age of the Petitioners both at the time of the commission of the of the offence, the 11 years that they have been in custody pursuant to section 333(2) of the CPC and the rehabilitation programs taken while in custody. What is aggravating in this case is that there was needless loss of human life. The assault, humiliation and deprivation of his dignity was unprovoked. Besides, he was too old to defend himself. If he could, the Petitioners and their compatriots outnumbered him.

It goes without saying that society abhors this kind of gratuitous violence where individuals take the law into their hands own hands over perceived wrongs committed by fellow citizens. There was absolutely no justification on their part in resorting to the type of brutality that they subjected the old culminating to his death. Such behavior cheapens and degrades human life.

I have also taken into account the Court of Appeal decision post the Muruatetu Case (supra) provide some guidance on the appropriate sentence. In **Jonathan Lemiso Ole Keni v Republic NRB Criminal Appeal No.51 of 2016 (2018) eKLR** where the appellant shot a person without any provocation, the court imposed a sentence of 30 years’ imprisonment. In **John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 (2018) eKLR**, the Court of Appeal upheld a sentence of 25 years in a case of murder where the appellant assaulted the deceased several times causing his death.

In all the circumstances of this case the sentence of 25 years from the date of arrest is justified.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019.

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REUBEN NYAKUNDI

JUDGE