



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 234 OF 2018

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: 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

NYANDO MAKUTA MWAMBANGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein seeks a resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**.
2. The Petitioner was tried and convicted for the offence of Murder in Mombasa High Court Criminal Case No. 14 of 2002 and sentenced to death which sentence was later reduced to life imprisonment. He has been in prison for 19 years after exhausting their Appeal processes. The Petitioner armed with a panga hacked **Mr. Mizingo Munga Gube** (relative) on allegations of witchcraft.
3. **Mr. Fedha** for the prosecution prays for a definite sentence of 35 years including the 19 years served due to the circumstances of the charge.
4. The Petitioner submits that he has reformed and he is ready to be re-integrated back to the society. He further stated that the murder was as a result of provocation on account of witchcraft and that he has the deceased family are in good terms.
5. I have carefully considered the issue at hand. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, this Court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. I have noted that the Petitioner has been in custody for approximately 19 years since his arrest. The aim of punishment is **community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation**.
6. Though no Prison's Progress Report has been filed as ordered by this Court on the 11/3/2019, I note that the Petitioner's submissions and documents attached that the Petitioner has acquired grade 1 tailoring and dress making skills basic guidance and counselling and that he is of general conduct and behavior. He has also acquired grade 1 skills in sign writing and polishing during his incarceration.
7. This Court has considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the Court of Appeal case of **John Ndede Ochodho Alias Obago vs. Republic KSM CA Criminal Appeal 120 of 2014(2018) eKLR** the Court upheld a sentence of 30 years in a case of murder where the appellants assaulted the deceased several times causing his death.

8. I have carefully considered the foregoing, the peculiar circumstances of this case show that the aggravating factors outweigh the mitigation. I have arrived at the decision that the Petitioner should appropriately be punished for his crime. There is no dispute that the life he illegally took cannot be compensated. Murder must be properly punished to send a clear warning to the would be murderers that they would be severely punished.

9. I now hereby set aside the death sentence imposed on the Petitioner and substitute the same with a jail term of twenty seven (27) years from the date of arrest.

Right of Appeal in 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 19th day of December 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant