



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 211 OF 2018

MANGALE SOMBO MRICHENI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein MANGALE SOMBO MRICHENI was charged with the Offence of murder contrary to 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were that *on the 7th day of March 2007 at Mtumwa Village, Mwereni Location, Msambweni District within coast province murdered CHIBUTA MWACHILUNGO*. He was sentenced to death which was later reduced to life imprisonment.
3. His appeal to the Court of Appeal was dismissed on 21/7/2014 and sentence upheld.
4. The Petitioner is now in this court pursuant to the Supreme decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.
5. When the matter came for resentencing, Ms. Balongo, learned counsel appeared for the State. Counsel submitted that the Petitioner brutally slashed the deceased to death with a panga. The deceased was an old man and was not armed. Counsel prayed for a definite and deterrent sentence of 50 years imprisonment.
6. The Petitioner on his part submitted that he regrets his action; that he has reformed and transformed through school as he has done his primary school and will be sitting for K.C.P.E; that he has also done a paralegal course and a theological course hence he feels he can rejoin the free society.
7. The Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that

paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

8. I have considered the petition and the submissions. The Petitioner is a first offender. He has transformed by going to school and also taking up courses to better himself.

9. However, as the prosecuting counsel pointed out, there are aggravating factors. The Petitioner committed murder. He practiced some barbaric oath on the victim in the name of witch hunting and sentenced the victim to die. He used a dangerous and offensive weapon in the form of a panga to kill the victim. He does not seem remorseful in my view for trying to justify his actions on murdering the victim who was an old man and had no weapon at all.

10. I will echo the words of the learned Lady Justice M. Odero in her judgment on appeal of the Petitioner’s case to the High Court: *“I have considered the mitigation raised on behalf of the accused. The accused launched an unprovoked attack on an armed old man for no justifiable cause whatsoever. This culture of killing defenseless elders on the pretext of fighting witchcraft must come to an end. The accused showed no mercy to the deceased and in my view does not deserve the mercy of this court.”*

11. This Court cannot condone such barbaric acts. As earlier stated, the Petitioner does not sound remorseful. In his submissions he has tried to justify his actions by trying to explain how he killed the victim because the victim allegedly took an oath that revealed he was a witch. The Petitioner has served 12 years in prison, this is not sufficient punishment for his barbaric atrocious act.

12. For the foregoing reasons, I hereby set aside the death sentence imposed on the petitioner. Instead therefore I hereby jail the petitioner to serve a prison term of 30 years from the date of arrest

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE