



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 148 OF 2019

JOHN MWAZO MACHALA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in Mombasa High Court Criminal Case No.1 of 2013. He was tried and convicted

and sentenced to death. He lost his appeal in the Court of Appeal in Mombasa Criminal Appeal No. 24 of 2016, and he has been in jail for 7 years.

2. The Petitioner has now petitioned this Court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR* in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.

Brief Circumstance of the offence

3. The particulars are that the deceased, a girl aged 5 years old, disappeared and was later in the evening found dead in a room in the hotel in which the Petitioner lived. There was evidence that the deceased was defiled before being killed. The Petitioner who was the only person living in the hotel at the time of the deceased disappearance, allegedly refused to open his door, and that is when neighbours opted to break into the Petitioner's room. However, the Petitioner attempted to run, but was apprehended, and upon searching the bag the Petitioner was carrying, bloodstained clothes belonging to the deceased were recovered.

4. The Petitioner submitted that as a first offender, he regretted his crime and that it was due to idleness, bad company and lack of knowledge that he committed the crime. However, during his imprisonment, he has realized his mistakes, he is reformed and has also accepted Jesus Christ as his savior. The Petitioner further stated that he had obtained 6 diplomas in Bible studies, is a paralegal, and he is a grade 3 electric technician and he is also an Advocate for "crime si poa". The Petitioner urged the Court to give him a second chance so that he could go and preach the gospel of peace and the need to obey laws.

5. **Ms. Wanjohi**, learned prosecutor submitted that the Petitioner ought to be punished and the sentence meted should be commensurate to the offence of murder, which in this case was carefully calculated and executed. Further, Counsel argued that the rights of the victim and that of the public at large outweigh the Petitioner's prayer to be released. On the sentence, Ms. Wanjohi submitted that a deterrent sentence of 40 years including time served in prison would be appropriate.

6. I have carefully considered the petition, the submissions by the petitioner and the State and the issue at hand. Sentencing is a discretion of the trial court. In *Ambani v Republic [1990] KLR*, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. Petitioner's Progress Report indicates that he is remorseful and given a second chance, he is willing to be a good citizen. He has a diploma in Bible studies, and he is a trainer of trainers. Therefore, he is very resourceful as he works as a teacher/chaplain in the prison.

8. I have considered the mitigation, his prison progress report which indicates that he is currently 49 years and has served 9 years in prison. I have also considered the aggravating circumstances in this case. This Court finds that the crime committed by the Petitioner was so grave and caused death to an innocent child. That crime must be met with adequate punishment to send a clear message that crime does not pay and shall be heavily punished once established.

9. The aim of punishment is **community protection**, deterrence, retribution, rehabilitation, restorative Justice and reformation. This Court has noted, however, the fact that the Petitioner is of good character and is clearly reformed. It is because of these that this Court hereby sets aside the death sentence imposed on the Petitioner by the trial Court which was later commuted to life imprisonment, and instead thereof jails the Petitioner for a term of 35 years from the date of arrest.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF APRIL, 2021

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant