



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 14 OF 2020**

MTAWALI AMIN NGAWA.....1<sup>ST</sup> PETITIONER  
SAFARI FOLENI NGAWA.....2<sup>ND</sup> PETITIONER  
CHARO CHOME KISTAO.....3<sup>RD</sup> PETITIONER  
FOLENI KARIMA NGAWA.....4<sup>TH</sup> PETITIONER  
SAID AMIN NGAWA.....5<sup>TH</sup> PETITIONER  
BANAKA NGAWA CHOME.....6<sup>TH</sup> PETITIONER  
NGALA CHARO PONGA.....7<sup>TH</sup> PETITIONER  
ABEID AMIN NGAWA.....8<sup>TH</sup> PETITIONER

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

**The Petition**

1. The Petitioners were tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the Penal code as captured in the Judgment of the High Court in **Criminal Case No. 40 of 2012**. They entered a plea of guilty and their trial commenced. The learned judge found them guilty of the said offence, convicted them, and sentenced them to death. Being aggrieved by the said conviction and sentence, the Petitioners filed Mombasa Court of Appeal Criminal Nos. 3, 4, 5, 6, 7, 9 & 10 of 2016 wherein the appellate court upheld their conviction but set aside the death penalty and substituted it with a 20 year jail term which was to be calculated from the date of conviction and sentence. The Court of Appeal judges in setting aside the death sentence applied the decision of the supreme court in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and took into consideration the petitioners mitigation.
2. The Petitioners lodged this Constitutional Petition seeking to be released to join the society. On behalf of the Respondent (DPP), submissions dated 26/7/2021 were filed and served upon the Respondent in response to the said petition. The Petitioners basically seek to be released from prison and freed from serving the 20 years jail term.
3. When the matter came for resentencing Miss. Wanjohi learned counsel appeared for the respondent (DPP). Counsel submitted that there is no right of resentence in this matter. That the petitioners were already sentenced to 20 years, and counsel urged the court to dismiss the petition.
4. The Petitioners on their part submitted that they are from the same family, they have been in jail for long and they are parents.
5. I have considered the petition and the rival submissions and my understanding of the Petitioners' case is that they are seeking further re-sentencing.
6. **The Judiciary Sentencing Policy Guidelines** on objectives of sentencing provide that: *"Sentences are imposed to meet the*

following objectives:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community's condemnation of the criminal conduct."
7. The court in the case of **Josiah Mutua Mutunga & another v Republic [2019] eKLR** quoted the following case of laws:

In the case **R v Scott (2005) NSWCCA 152** Howie, Grove and Barr JJ stated:

*"There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."*

In a New Zealand decision namely **R vs. AEM (200)** it was decided:

*"... One of the main purposes of punishment...Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment."*

8. The Supreme Court in **Petition No. 15 & 16 (Consolidated) of 2015** gave directions on the Muruatetu case guideline 4 states,

**"Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn."**

9. In this case the appeal was heard and determined and the petitioners resented to 20 years under the Muruatetu decision.

10. The court in the case of **Lemason Tengeti v Republic [2020] eKLR** the court stated that, *"This brings me to a critical point where I must express concern that convicted persons are now abusing the Muruatetu case. Accordingly, seeking for a further re-sentencing in this case is an abuse of court process."*

11. Accordingly, the petitioners' petition for re-sentencing is an abuse of the court process.

12. In the upshot, I dismiss the petition herein for re-sentencing. The Petitioners to serve the sentence imposed by the Court of Appeal. However, the years spent in remand be deducted from the sentence under Section 333(2) of the Criminal Procedure Code if the Petitioners prove to the prison authorities that they were indeed in remand during trial period.

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 16TH DAY OF SEPTEMBER, 2021.**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant