



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 107 OF 2018**

**KAZUNGU CHARO KENGA.....PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The Petitioner was convicted for the offence of Murder contrary to Section 203 as read with 204 of the Penal Code and sentenced to death in Mombasa HCCr. Case No. 26 of 1998. He appealed in Criminal Appeal No. 179 of 2002 but the Appeal was dismissed and sentence upheld.

2. The Petitioner has now petitioned this court for review of sentence in view of the Supreme Court declaration in **Francis Kariokor Muruatetu & Another vs. 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 on 3<sup>rd</sup> May 1997 at Viragoni Village in Mwanamwinga Location within Kilifi District of the Coast Province the Petitioner murdered Kenga Charo Kenga.

4. The Petitioner submitted that the death sentence which was commuted to life imprisonment is unconstitutional. He has now exhausted his right of appeal and has approached this Court to declare the said death sentence unconstitutional and contrary to Article 50(1) and Article 25(a) of the constitution, and to impose an appropriate sentence upon him.

5. He further submitted that the court did not consider his mitigation as he is a first offender and has never been accused of breaking the law and at the same time he is very remorseful. The Petitioner apologized for the offence he committed, submitting that he committed the offence out of anger as he had believed that his elder brother had killed his child through witchcraft. The Petitioner submitted that he has since reconciled with his elder brother's family who regularly visit him in prison and who also want him out of prison. The Petitioner further submitted that he has a wife and 4 Children.

6. On his part, Mr. Fedha learned Counsel for the State submitted that the court has the jurisdiction to review the death sentence. Counsel urged the court to jail the Petitioner for a term of 35 years because he caused a needless death even if it was his own brother.

7. The social Inquiry report states that the family is ready to welcome the Petitioner home.

8. I have considered the Petition as well as submissions of the parties. On the issue of re-sentencing the Petitioner submitted that he has reformed and that is supported by the Prisoner's Progress Report as well as the Social Inquiry Report filed in Court on 15<sup>th</sup> January, 2020. The Petitioner actually occasioned the death of his own brother. He submitted that he acted in anger on the suspicion that his brother had killed his child through witchcraft. This Court directed a Social Inquiry Report in the matter and the same was filed on 15<sup>th</sup> January, 2020. The Report shows that the Petitioner had returned from work related journey and found that his child had died and had been buried. In anger, he hit his elder brother with a wooden stick and he succumbed to the injury. The Petitioner has a wife and 4 children. His brother's widow and his brother's son visit him in prison and have forgiven him. The family wish to be re-united as the Petitioner is now the only remaining head of the family yet he is in prison. The Social Inquiry Report states that the family is ready to welcome the Petitioner home.

9. I have considered Petitioner's mitigation. The Petitioner acted in a spur of the moment. That action, unfortunately led to the death of his elder brother. The Petitioner himself had also lost a child and had blamed his brother for that death. What the Petitioner did was wrong. He has been in jail for 23 years. The families want a reunion because the Petitioner is the only remaining head of the family.

10. In the circumstances, this court exercises its mercy jurisdiction and reaches judgment as follows:-

i) The death sentence imposed upon the Petitioner herein is hereby vacated.

ii) The Petitioner is sentenced to a jail term of 23 years. The same having been served, the Petitioner is hereby freed and released from prison unless lawfully held.

That is the Judgment of the court.

**Dated, Signed and Delivered at Mombasa this 9<sup>th</sup> day April, of 2020.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person via video link

Ms. Mwangeka for DPP

Mr. Kaunda Court Assistant