



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 124 OF 2018

GODFREY NGOTHO MUTISO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The appellant was convicted by the High Court, (**Sergon J.** sitting with three assessors in Mombasa) for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It had been alleged in the information filed by the Attorney General, that on the 4th day of November, 2004 at Mkomani Village in Kongowea Location of Mombasa District, jointly with others not before court, he murdered Patrick Waweru Gachuki (“the deceased”).

2. From the evidence tendered by the prosecution through 9 witnesses, the court found as proved facts that the appellant lived in a Swahili-type house in Mkomani Village in Mombasa. He owned two mobile phones. At about 1 p.m. on 4th November, 2004, he was having a bed rest when someone walked into his house and walked away with the two mobile phones. He made a report of the incident at Nyali Police Station. In the meantime he made his own inquiries which apparently led to the deceased as the thief. The deceased was a frequent visitor in a nearby bar known as Corner Pub where his girlfriend, Josephine Ayuma Otieno was a waitress. The appellant was also a frequent customer at the pub and was well known by Josephine and the manager of the pub. At about 4 p.m. on the same day, the appellant went to the pub accompanied by his brother. They were served with some soft drinks and the appellant informed the manager that the deceased had stolen his mobile phone and he was looking for him. The two left the pub. Later in the evening, at about 9 p.m. the deceased went to the pub and was informed by Josephine that the appellant was looking for him on allegation that he had stolen the appellant’s mobile phones. The deceased denied the allegation and said he was going to see the appellant. Just then the appellant’s brother accompanied by two other persons, all know to Josephine, arrived at the pub. They told the deceased that the appellant was waiting for him at his house and he followed them. Half an hour later, Josephine was informed by another person, who also testified at the trial, that the deceased was being beaten up at the residence of the appellant. Josephine and that other person went to the scene and found the appellant, his brother and his brother-in-law beating up the deceased outside the corridor of his house. The corridor was fully lighted by electricity. The deceased was half naked and his hands were tied behind his back. The appellant was holding a whip with which he was assaulting the deceased. Josephine and the other witness were chased away and branded thieves as the assault on the deceased continued. She returned with two other witnesses who also knew the appellant and they testified at the trial. They also found the appellant holding a Somali sword and a whip while another man was holding a wooded plank. Both were assaulting the deceased calling him “*thief ... thief*”.

3. The matter was reported to Nyali Police Station and two officers arrived at the scene and rescued the deceased. One of the officers testified that on arrival at the scene he found a crowd of people who were standing and watching helplessly at three men beating the deceased next to the appellant’s house. They found the appellant holding a rubber whip with which he was beating the deceased. They saw deep cuts on the deceased’s chest. They also saw one of the assailants hold the deceased’s head and bash it against the wall prompting bleeding through the mouth. The police arrested the appellant while the other two escaped and the deceased was taken to hospital where he was admitted for treatment. Six hours later, he died while undergoing treatment. An autopsy carried out on the body revealed multiple cuts and bruises all over the body, swellings on the lips and bruises on the face. There was also haemorrhage below the skin of the skull and the pathologist was of the opinion that the deceased died as a result of intra-cranial haemorrhage due to head injury.

4. The appellant’s defence was that after his phones were stolen he made a report to Nyali Police Station and went back to his house to rest. At about 9 p.m., he heard some people screaming. He rushed out and found some *kanzu*-wearing crowd beating up the deceased on suspicion that he was one of the many African thieves in the area. He intervened to save the deceased and called the police who arrived at the scene and collected the deceased’s family. He was subsequently arrested as a suspect and later charged for the offence of murder.

5. The case was summed up to the assessors and they returned unanimous opinion that the appellant was guilty as charged. The learned Judge evaluated all the evidence and believed the eye witnesses and the police officers who connected the appellant with the offence. He made findings that the appellant, jointly with two others who were still at large, not only committed the act of assaulting the deceased but did so with the common intent to cause grievous harm or death. He found in the process that the appellant’s defence was an obvious and blatant

lie which only served to corroborate the independent evidence available.

6. Upon conviction, the appellant was sentenced to “*suffer death in the manner authorized by law*”.

7. The Petitioner then appealed to the Court of Appeal against conviction and the mandatory sentence of death. The Court of Appeal (**R.S.C. Omolo, P. N. Waki, J. W. Onyango Otieno**) agreed with the Petitioner that the mandatory death sentence under Section 204 of the Penal Code was unconstitutional, to the extent that it outlawed mitigating circumstances of the crime of murder. The court referred the case back to the High Court for resentencing after considering mitigating circumstances. However, before the High Court could impose a sentence following the direction of the Court of Appeal, the Supreme Court in the **Francis Kariokor Muruatetu & Another –Vs- Republic SCK Pet. No. 15 of 2015 (2017) eKLR** decided that a mandatory death sentence in murder case was unconstitutional. The Petitioner is now in this court for fresh sentencing following the directions of the aforesaid Court of appeal and the decision of the Supreme Court aforesaid.

8. Parties submitted on sentencing. The Petitioner submitted that he has been in prison for fifteen (15) years. He is now 52 years. The Petitioner submitted that he is remorseful for the crime he committed and that he has already reformed and is ready to rejoin the society. He submitted that the 15 years he has served in prison is enough. He is ailing and is also on treatment for diabetes.

9. On their part the prosecution through Mr. Fedha submitted that the crime committed by the Petitioner was heinous and the manner in which it was done was so terribly inhuman. Mr. Fedha submitted that the prisoner should be jailed for eighteen (18) years.

10. I have carefully considered the Petition. That the Petitioner committed a serious offence in a very inhuman manner cannot be challenged. The progress report filed by the Prison speaks well of the prisoner who is a staunch Catholic and is of good character in prison.

11. A Social Inquiry Report dated 5.2.2018 was also filed by the Probation and After Care Service. The report states that the Petitioner’s family are looking forward to his release. The Petitioner is married with two (2) children. The mother and relatives of the victim object to any early release stating that life is God given and is sacred and nobody has the right to take away the life of another.

12. The Social Inquiry Report is favourable for an early release of the Petitioner to the Society.

13. I have carefully considered the foregoing, and I have arrived at the decision that the Petitioner should appropriately be punished for his crime, even after considering all the above factors and mitigating circumstances. The Petitioner did not mean to kill, but the killing still took place and the deceased’s family are still mourning. There is no evidence of any outreach by the family of the Petitioner to that of the deceased to enable the family of the deceased accept their situation. I have also considered that the Petitioner is an active member and official of the Catholic Church. These factors have very considerably in my view reduced the period for which I sentence the Petitioner.

14. I therefore herewith set aside and vacate the death sentence imposed on the Petitioner and substitute therefor a sentence of twenty seven (27) years from the date of conviction.

That is the Judgment of the Court.

Right of appeal within 14 days.

Dated, Signed and Delivered at Mombasa this 8th day of October, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Fedha for State

Petitioner in person

Mr. Kaunda Court Assistant