



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 39 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY

JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND

FREEDOM OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER: OF: ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION

BETWEEN

MAINA KAMAU ALLAN.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein seeks a resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR**.

2. The Petitioner was tried and convicted of the offence of Murder and sentenced to death. He lost his appeal in the Court of Appeal in Msa Criminal Appeal No. 66 of 2014. He has been in jail for 12 years. The Petitioner jointly with others armed with crude weapons broke into the deceased house and dragged him from his house and assaulted him for hours and in the process threatened anybody who dared to intervene of dire consequences. On arrival of police officers at the scene, the petitioner together with his accomplices were still in a combative mood and the arresting officer was forced to cock his gun and threatened to shoot them and that is when the Petitioner and his accomplices surrendered.

3. **Mr. Fedha** for the prosecution prays for a deterrent sentence of 40 years including the 12 years served as the Petitioners brutally murdered one Gideon Nganga (deceased)

4. The Petitioner submits that the sentence of death issued by the Court of Appeal against him is not ideal and from his mitigation, he seeks for resentencing that ought to consider that he has reformed and given a chance he can be a useful person in the society since the 12 years he has been in prison is enough to pay his debt to the society.

5. I have carefully considered the issue at hand. Under the proviso to **section 333(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, this Court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. I have noted that the Petitioner has been in custody for approximately 12 years since his arrest. The aim of punishment is **community protection**, deterrence, retribution, rehabilitation, restorative Justice and reformation.

6. His Prison's Progress Report indicates that he has undergone guidance and counselling and anger management and he is of exceptional

character which has earned him a position of being in charge of the block he resides in and has acquired Grade I tailoring skills.

7. I have considered judgments of Superior Courts that are intended to ensure consistency and fairness. In the Court of Appeal case Of **John Ndede Ochodho Alias Obago vs. Republic KSM CA Criminal Appeal 120 of 2014(2018) eKLR** the Court upheld a sentence of 30 years in a case of murder where the appellants assaulted the deceased several times causing his death.

8. The Petitioner with his accomplices planned and executed the murder of the deceased and they even threatened anybody who tried to stop them from maiming the deceased. The Petitioner must understand that he caused loss of a life. Murder must be properly punished to send a clear warning to the would be murderers that they would be severely punished.

9. I now hereby set aside the death sentence imposed on the Petitioner and substitute the same with a jail term of thirty five (35) years from the date of arrest. Right of Appeal in 14 days.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 20th day of November 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant