



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 77 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**

**PETER KINGORI MWANGI.....1<sup>ST</sup> PETITIONER**

**DANIEL KAMAU KIMEMIA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

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

**JUDGMENT**

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

2. The Petitioners were tried and convicted of the offence of Murder in Mombasa High Court criminal case No. 2 of 2008 and sentenced to death by the Court of Appeal which sentence was later reduced to life imprisonment and they have been in prison for 12 years after exhausting their Appeal processes. The Petitioners 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 petitioners were in a combative mood and the arresting officer was forced to cock his gun before the Petitioners could surrender.

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 Petitioners submit that the trial Court failed to consider the mitigating factors as part of their trial and that during the 12 years of their incarceration, they have been peaceful, of good behavior and they have been rehabilitated. It is further submitted that the incident occurred due to provocation since the 2<sup>nd</sup> Petitioner Daniel Kamau Kimemia found the deceased having sex with his wife on his matrimonial bed and that it was in Self-Defence that fatal injuries were inflicted on the deceased.

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 petitioners have spent in custody in determining the sentence. I have noted that the Petitioners have been in custody for approximately 12 years since their arrest. The aim of punishment is **community protection, deterrence, retribution, rehabilitation, restorative Justice and reformation**.

6. The social enquiry reports dated 23.9.19 from the Probation and Aftercare Services indicates that the Petitioners are obedient, changed and positively recommends them for re-integration into the society. A non-custodial order was also recommended to ensure a supervised rehabilitation and re-integration process

7. The Petitioners' Prison's Progress Reports indicates that they have undergone guidance and counselling and anger management. The 1<sup>st</sup> Petitioner on his part has undergone training in welding and he is a Grade II Welder while the 2<sup>nd</sup> Petitioner has undergone tailoring and dressmaking course and he is a Grade II holder in tailoring trade test.

8. This Court has 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.

9. It is clear that the Petitioners planned and executed the murder of the deceased and that they threatened anybody who tried to intervene to rescue the deceased. There is no dispute that life they illegally took cannot be compensated. The petitioners must understand that they 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.

10. I now hereby set aside the death sentence imposed on the Petitioners 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 20<sup>th</sup> day of November 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant