



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 74 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

RAMADHAN KOMBE.....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 in Mombasa High Court Criminal Case No. 48 of 1994 and sentenced to death and has been in jail for 17 years, after losing appeals both in the High Court and in the Court of Appeal and thereby exhausted his Appeal process. The Petitioner murdered his two young children and viciously attacked his then wife and his father-in-law before he was repulsed and had to run away. Later when examined by a psychiatrist, it was established that he was suffering from varied psychological problems

3. **Mr. Fedha** for the prosecution prays for a deterrent sentence of 50 years including the 26 years served as the Petitioner brutally murdered two minors.

4. The Petitioner submits that the trial Court failed to consider the mitigating factors as part of his trial process and that the prison doctor concerned with his mental status has approved and recommended that he is of stable mental capacity and he is ready to be re-integrated back 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 27 years since his arrest. The aim of punishment is **community protection**, deterrence, retribution, rehabilitation, restorative Justice and reformation.

6. The social enquiry report dated 17.9.19 from the Probation and Aftercare Services indicates that the Petitioner has recovered from his mental problems and he is now of sound mind. He does not pose any risk to others and that he has been rehabilitated and his family in Mombasa is ready and willing to receive him back to the society.

7. His Prison's Progress Report indicates that he has undergone counselling and he is psychological stable and he manages his anger well and

is of good discipline.

8. I am aware that detention at the president's pleasure has been declared unconstitutional –See. **A.O.O. vs. 6 others vs Attorney General & another [2017]**

9. I have carefully considered the Petition, submissions by parties and relevant judicial authorities on resentencing for similar offences. I have also considered the gravity and mental state of the accused and the time served in prison. I do find that it is judicious to give a definite sentence in cases concluded under Section 166(1) of the CPC. After so doing, the Court becomes *functus officio* and should let the executive carry out its obligation under Section 166(2) to (7) of the CPC.

10. In **Charles Lucheti & 3 others v Republic [2019] Eklr**, the Court of Appeal held as follows...

“we nonetheless set aside his detention at the President's pleasure as the sentence. In lieu thereof we direct that he be detained for 15 years. As for the 2nd and 3rd appellants, we set aside the sentence of death imposed on them and instead sentence them to 20 years imprisonment respectively.”

11. In the premises, I set aside the Petitioner's detention at the President's pleasure. In lieu thereof I direct that the Petitioner be detained for 29 years from the date of his arraignment in Court. 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