

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HC PET . NO.E 002 OF 2020

STEPHEN ODHIAMBO ONYANGO..... APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

STEPHEN ODHIAMBO ONYANGO is the applicant in the undated Notice of Motion filed in court on 25/9/2020. It is brought pursuant to Articles 23 (1) (3) (f), 165 (3) (a) (b), 24 (1) (3), 25 (a) (c) and 29 (a) (b) (f) of the Constitution.

The Notice of motion is supported by the applicant's affidavit in which he deponed that he was convicted and sentenced to twenty-five (25) years imprisonment for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He now seeks redress for breach of his fundamental rights and freedoms guaranteed under the Bill of Rights; that this right to freedom guaranteed under Article 24 (1) and (3) have been limited; that he has been subjected to inhumane and degrading punishment and deprived of the right to fair trial; Arbitrary breach of Articles 25 (a) (c) of the Constitution and that the prosecution failed to prove the charge under section 203 and 204 of the Penal Code to the required standard.

The learned counsel for the State, **Mr. Kimanathi**, opposed the Petition. Counsel urged that after the applicant's appeal had been heard and partially allowed by the Court of Appeal in CR. Appeal 4/2016. The applicant filed a Constitutional Petition No 37/2019 under Article 50 (6) of the Constitution claiming that he had new and compelling evidence; that J. Mrima heard the petition and dismissed it on 26/6/2020. Counsel attached a copy of the said judgment. It was his submission that this petition is a fishing expedition and duplicity and a court with con-current jurisdiction has already determined it; that it was the duty of the applicant to disclose that he had litigated the same issue before.

The background of this matter is that the applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was tried, convicted by Judge Majanja and sentenced to life imprisonment. He appealed to the Court of Appeal in Criminal Appeal No. 4 of 2016. The appeal on conviction was sustained but the court partially allowed the appeal on sentence by reducing the sentence from life imprisonment to 25 years imprisonment. The applicant then filed a constitutional Petition on 37/2019 which was dismissed by Judge Mrima on 26th June 2020.

Article 24 of the Constitution prohibits limitation of any right or fundamental freedom except by law and only to the extent that the same is reasonable and justifiable in an open and democratic society based human dignity, equality and freedom. Though the applicant claims that his rights to freedom have been limited, he did not demonstrate how because he is serving a lawful sentence that was imposed by the Court of Appeal.

Article 25 provides for fundamental rights and freedoms that may not be limited. The applicant has alleged breach of his rights under Article 25 (a) and (c). Sub Article (a) provides for freedom from torture and cruel, inhumane or degrading treatment or punishment. Sub article (c) provides for right to a fair trial. Though the applicant has alleged those breaches, the applicant has not demonstrated how either the High Court or Court of Appeal breached those rights. It is a fundamental tenet of the law that he who alleges must prove. There was no attempt made to do so.

The applicant also cited Article 29 which accords every person freedom and security of the person. He alleges that it was arbitrarily taken away.

The appellant went through a trial in the High Court and that court's decision was confirmed by the Court of Appeal. He is lawfully in Prison and the allegation has no basis.

The appellant has not supported any of the allegations with evidence.

In addition to the above, when the applicant filed the Constitutional Petition No 37 of 2019, he should have included all his claims of constitutional breaches therein so that the court could have dealt with them at once. He cannot keep on coming to court piecemeal. Litigation must come to an end.

I find that the applicant has not come to court with clean hands. He knew that his petition was dismissed a few months ago in June 2020 and he filed another in September 2020 in order to have a second bite at the cherry. The applicants action is an abuse of the court process and must be frowned upon at all costs.

The Petition lacks merit and is hereby dismissed.

Dated, Signed and Delivered at Migori this 25th day of February, 2021

R. WENDOH

JUDGE