



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E033 OF 2021

(From Original criminal case NO. 32 of 2013 at Kilifi)

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION 2010

AND

IN THE MATTER OF THE ARTICLES 23 (1), AND 165(3) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 19,20,24,27 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE

MUGANGA CHILEJO SAHA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

CORAM: Hon. Justice R. Nyakundi

Muganga Chilejo Saha – Petitioner

Mr Mwangi for the state

R U L I N G

The Petitioner was charged, tried and convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act NO. 3 of 2006. The petitioner being aggrieved with the conviction and sentence of life imprisonment appealed to the High Court and later to the Court of Appeal on such matters. To be true to their respective jurisdictions both Courts dismissed the appeal on conviction and sentence. In this third forum the petition invokes Article 50 (6) (a) (b) of the Constitution for this Court to hold a new trial specifically on sentence. The petitioner relies on his affidavit grounded on the aspects of review and admission of mitigation to render a lesser sentence.

Having considered the petition and materials in support the crux of the issue at stake is whether the petitioner has satisfied the criteria provided for in Article 50 (2) (Q) as read together with Article 50 6 (a) (b) of the Constitution.

Determination

In this petition, jurisdiction of the Court is exercisable vide Article 50 (6) (a) & (b) of the Constitution. Such jurisdiction is concerned with the doctrine of exhaustion in the appeal process or secondly, if the time of appeal has since lapsed, the petitioner can demonstrate new and

compelling evidence for the Court to be seized of jurisdiction. The centrality of the jurisdiction here falls within the provisions of this Article 50 (6) (a) (b) of the Constitution.

The question in this case relates to the determination of the sentence with a desire to have it reduced to another period or penalty premised on the nuances in the affidavit.

As a result of that jurisdiction donated by the Constitution, its incumbent upon the petitioner to demonstrate existence of new and compelling evidence available to enable him reap a benefit on sentence. In this regard the opportunity for the case must satisfy the threshold in order to re-litigate the case afresh.

Accordingly, as a review court the petitioner must discharge the burden of proof on the veracity of the subsequent circumstances with fresh and compelling evidence which could result in varying or setting aside the impugned sentence. In *Connedy V DPP [1964] AC 1254 Lord Devlin* outlined the injustice associated with multiple trials for the same criminal offence where he stated; -

“There is another factor to be considered, and that is the Court’s duty to conduct their proceeding so as to command the respect and confidence of the public.”

This case is straightforward enough, the sole question, being whether, or not the subject matter had formed, the ground of the previous decisions. Once again, however the legal issue in this petition is an although to get round a previous decision to assert a right in a matter which is correctly resjudicata. The real facts in the petition happen to be the same facts as in the first prosecution and also in furtherance of the appeals to the superior Courts. This creates an estoppel for the Court to exercise jurisdiction over the same subject matter against the petitioner.

Consequently, the necessity for fresh and compelling evidence discovered by the accused stipulated in the constitution must be comprehensively set out in the affidavit to pursue a petition of this nature. Unfortunately, this criterion has not been demonstrated by the Petitioner, to render the trial an irregularity in procedure to warrant a review of the sentence. There are no special circumstances or compelling evidence which has become available to make the order or sentence so passed unjust to occasion a greater injustice to the petitioner. The decision by the Court of Appeal has the force of res judicata against the remedies sought by the petitioner and no further remedy on review of sentence can be entertained by this Court. In the result the petitioner’s petition lacks merit for his sentence to be reviewed under Article 50 (2) (P) (Q) as read with Article 50 (6) of the Constitution.

It is so ordered

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr Mwangi for the state
2. The Petitioner