



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. E019 OF 2020

(Originating from High Court Criminal Case No. 6 of 2016 at Malindi and CA Cr App No. 48 of 2018)

**THE CONSTITUTION OF KENYA 2010(SUPERVISORY JURISDICTION
AND PROTECTION FUNDAMENTAL RIGHTS AND FREEDOMS OF AN
INDIVIDUAL HIGH COURT PRACTICE RULES 2013.**

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS
AND FUNDAMENTL FREEDOMS IN THE BILL OF RIGHTS**

AND

**IN THE MATTER OF ARTICLES 22(1), 23(1), 27 AND 165(3),
B, D, (II) OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF SECTION 203 AS READ WITH 204 OF THE PENAL CODE

BETWEEN

MWALEWA KADZENGA MUNGA.....1ST PETITIONER

ROBERT MWALEWA CHILUMO.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mwalewa Kadzenga Munga – Petitioner

Mr Mwangi for the state

R U L I N G

The Petitioners Mwalewa Kadzenga Munga and Robert Mwalewa Chilumo were charged, tried and convicted for the Offence of Murder contrary to section 203 as read with section 204 of the Penal Code.

At the end of the trial, the Petitioner was sentenced to 25 years imprisonment whereas the 2nd Petitioner got away with a punishment of 15 years imprisonment. Being aggrieved with both conviction and sentence they preferred an appeal to the Court of Appeal. At the trial on appeals, and consideration of the issues raised, apex court confirmed the impugned judgement with regard to conviction and sentence. In the after math of exhausting the appeal process, the background of the present petition is as prescribed in the petition and affidavits in support of the relief sought under section 333(2) of the Criminal Procedure Code.

Determination

The jurisdiction of the Court flows from the express provisions in the Constitution as provided for under Article 50 (6) (a) and (b) which states as follows. That a person who is convicted of a criminal offence may petition a High Court for a new trial if; -

a) The person's appeal, if any has been dismissed by the highest Court to which the person as entitled to appeal, or the person did not appeal within the time allowed, for appeal, and

b) New and compelling evidence has become available. The petitioner has explained in their affidavits that they are well within the well-established procedure for them to invoke the jurisdiction of this Court.

In adherence to the Articles of the Constitution, then in agreement with the Petitioners, that Article 50 (6) of the Constitution does permit the issue of so called a "new trial".

Having decided that the matter is properly before the Court, I now proceed to consider the applicability of section 333 (2) of the Criminal Procedure Code to the facts of the present petition. The provision again highlights that where a person is convicted and sentenced to a term of imprisonment for an offence, any period spent in lawful custody in respect of that offence he or she is charged with before final orders shall be taken into account in imposing the final punishment for that offence. The drafters of section 333(2) of the Criminal Procedure Code expressly adverted to the grant of remission exercised in accordance with these statutory provisions. From the record, I agree with the submissions by the petitioners that the trial court was required to take into account the period, spent in remand prior to their conviction and sentence. Therefore, this limb of the petition has merit.

I accordingly exercise the Courts mandate under Article 50 (6) (a) (b) of the Constitution to rule that new and compelling evidence has become available to the petitioners in so far as their order on sentence is concerned. The words in Article 50(6) of the Constitution read in parenthesis with section 382 of the Criminal Procedure Code imposes this Court with a Constitutional duty to review the sentence by deducting 2 years and 3 months for the benefit of the 1st petitioner, and for the 2nd petitioner the period of 2 years which has been firmly grounded to have been spent in remand custody.

The 23(twenty-three) year period of imprisonment which sentence was ordered to run from the date of their conviction shall now commence from the respective date of arrest and indictment before the trial Court. This remedy could be seen as a logical step forward or at least to clarify error or mistake apparent on the face of the record. The error took the trial Court outside the permitted field leading to the decision being irregular and conveniently incorrect and unjust.

As a result, the petition succeeds to that extent calling for the amendment of the warrants to give effect to Section 333 (2) of the Code.

It is so ordered.

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

.....

R. NYAKUNDI

JUDGE

In the presence of

Edward Katana Safari Petitioner

Mr Mwangi for the state