



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 105 OF 2019

(CONSOLIDATED WITH CONSTITUTIONAL PETITION NO. 106 OF 2019)

1. MOHAMED DADI KOKANE

2. SAMUEL MWACHALA

3. JAMES CHACHA MWITA.....PETITIONERS

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners herein were charged in HCCR No. 21 of 2010, tried, and convicted of the offence of murder as defined in terms of Section 203 and punishable in Section 204 of the Penal Code. They were thereafter sentenced to 40 years imprisonment. They appealed to the Court of Appeal vide Criminal Appeal No. 30, 31, 32 and 33 of 2015 and their appeal on their conviction and sentence was dismissed by the Court of Appeal. Having been dissatisfied by both the trial court and the Appellate court the Petitioners have now brought the instant petition seeking a review of the trial process, re-hearing and that the evidence be recorded afresh. Their petition is hinged upon Article 50(1), (2) and 6(a) & (b).

2. The petition is premised on the grounds in the petitioner's written submissions filed in court on 27/11/2020. The Petitioners submit that the charges against them were not compliant with the provisions of Sections 134 and 137 of the Criminal Procedure Code, since the information implied that the Petitioners had taken part in the killing of **Bridged Rodney**, yet it emerged that the eye witness was referring to someone who was at large, as the one who killed the deceased and despite the issue of the defectiveness of the charge being raised by counsel for the Petitioners, the trial court overlooked the said issue of defectiveness. Consequently, there was an infringement of the Petitioner's right to fair hearing guaranteed under Article 50 (2) of the Constitution.

3. The Petitioners also submitted that the prosecution did not prove its case beyond reasonable doubt since the element of malice aforethought to kill the deceased was not proved beyond reasonable doubt since there was no common intention to kill the deceased. Further, the Petitioners submitted that the identification of the Petitioners was utterly unreliable since PW1, PW2, PW3, and PW15's testimonies were total lies, fabrications and incriminated innocent people. Consequently, the prosecution evidence was unreliable, inconsistent, contradictory, not credible and the same inadmissible.

4. On the sentence, the Petitioners submitted that there was a serious error on the part of the trial judge in invoking the doctrine of common intention to justify the conviction against the Petitioners when there was no evidence to support the said finding. Therefore, the sentence of 40 years for the Petitioners who were present during a murder but there is no evidence that they actually participated in the murder was not justified.

5. The 1st and 2nd Petitioner submitted that it took a total of 10 and 27 days respectively after their arrest to be arraigned in court and there was no explanation from the prosecution for the delayed arraignment and the court on its own motion did not take up the issue of pre-arraignment custody. The Petitioners cited the finding in **Peter Ithembu Mwangi HC CR APP. 220/07** where the court held that even if the accused person does not raise an issue of a constitutional violation, the court can *suo moto* or *sua sponte* raise it.

6. The Petitioners also submitted that the trial court did not consider their Pre-conviction custody period when sentencing them to serve 40 years imprisonment, which is contrary to the provisions of section 333(2) of the Criminal Procedure Code.

7. **Ms. Wanjohi** learned prosecutor submitted that on the 11/08/2009, the deceased Campbell **Rodney Bridges** who was a Geologist and a

gemstone miner together with some of his employees went to Wundanyi Law Courts to attend hearing of a case in which some of his workers had been charged with trespass. Later on that day, the deceased proceeded to various authorities to report threat to his life, and that of his workers. On their way back to their camp at Kambanga, they came across barriers which had been ostensible erected by a group comprising of the Petitioners. When the deceased together with his employees alighted to clear the erected barriers, suddenly, a group of 20 to 30 men attacked them while armed with crude weapons which included pangas, spears, arrows, knives, iron bars. As a result of the vicious attack, the deceased succumbed to the injuries sustained from the attack.

8. The learned prosecutor submitted that the deceased was eliminated by the Petitioners because of a long-standing dispute between him and the local miners who wanted to take control of his mining business.

9. **Ms. Wanjohi** submitted that the Petitioners were properly sentenced and benefited from the *Francis Muruatetu Petition 2017* and they are serving a definite sentence of 40 years. Further, the learned prosecutor submitted that the trial court considered their mitigation during sentencing and consequently, this court has no jurisdiction to entertain the instant consolidated petitions, since the Petitioners had failed to certify the provisions of Article 50(6) (a) (b) of the Constitution, which requires provision of new and compelling evidence to warrant the audience of this honourable court.

The Determination

10. The instant petition is premised on **Article 50 (6) (a) & (b)** of the Constitution which provides that: -

“(6)A person who is convicted of a criminal offence may petition the 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 is entitled to appeal, or the person did not appeal within the time allowed; and

b. New and compelling evidence has become available.”

11. The issues that fall for determination are as follows:

i. Whether the Petitioners have met the threshold for ordering a new trial under Article 50 (6) of the Constitution.

ii. Whether there has been a violation of the petitioner’s right to a fair hearing guaranteed under article 50(2) of the Constitution.

(i) Whether the Petitioners have met the threshold for ordering a new trial under Article 50 (6) of the Constitution.

12. The threshold to be met by a petitioner who petitions this court for various reliefs is provided for in the above-mentioned Article 50(6). The Petitioners herein have passed the first hurdle since it is a fact that their appeal on their conviction and sentence to the Court of Appeal was heard and dismissed on merit, and their conviction, and sentence to forty (40) years imprisonment was upheld. Therefore, the remaining hurdle to be proved by the Petitioners is whether the Petitioners have furnished this court with new and compelling evidence that has become available to them.

13. In *Evans Sagero v Republic [2014], eKLR*, where the court held:-

“For a petition under Article 50(6) of the Constitution to succeed the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals.

Secondly, the evidence must be compelling, meaning that, it must be admissible, credible and not merely corroborative, cumulative, collateral or impending. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.”

14. In *Tom Martins Kibisu v Republic, Supreme Court Petition No. 3 of 2014 [eKLR]*, the learned Judges of appeal expressed themselves as follows:

“Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence.

The window of opportunity for such a new trial is subject to two conditions. (emphasis mine) First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling evidence.’”

15. The Supreme Court in *Tom Martins Kibisu v Republic (supra)* was emphatic that new and compelling evidence “*must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person*”.

16. In the instant case, I have looked at the Court of Appeal decision and this Court finds that the Grounds of Appeal raised by the Petitioners, which were determined by the Court of Appeal were the following.

a. Finding that the appellants had a common intention to murder the deceased.

b. Convicting the appellants on insufficient and incredible evidence.

c. Failing to resolve the material contradictions and inconsistencies in the prosecution case.

d. Rejecting the appellants defence

e. Finding that the prosecution had established its case to the required standard.

17. From the foregoing, save for the issue of pre-arraignment custody and Pre-conviction custody, this court does not find any new and compelling evidence that could, prima face, affect the petitioner's trial, outcome or sentence. What is relied on as new evidence was before the trial court and that court must have considered it wholly. As observed by the Court of Appeal in **Tom Martins Kibisu's** case (supra), the opportunity offered by Article 50(6) of the **Constitution**, strongly suggests, that a conviction is final and conclusive where the convict has exhausted his right of appeal so long as no new and compelling evidence has come to light.

18. On the issue of pre-arraignment custody and Pre-conviction custody, it is mandatory that the period which an accused had been held in custody prior to being sentenced be taken into account in meting out the sentence. I have had a chance to read the appellate court judgment and I have found out that this issue was not considered. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR** stated that:

“The court while applying this provision held that by dint of section 333(2) of the Criminal Procedure Code, the courts during sentencing ought to take into account the period that they had spent in custody before they were sentenced.”

19. It is noteworthy that the 1st Petitioner was arrested on 25/08/2010 and sentenced on 18/12/2014. Therefore, the computation of his 40 years' sentence shall run from 25/08/2010. The 2nd Petitioner was arrested on 2/09/2009 and sentenced on 18/12/2014. Therefore, the computation of his 40 years' sentence shall run from 2/09/2009, while the 3rd Petitioner was arrested on 28/01/2010 and sentenced on 18/12/2014. Therefore, the computation of his 40 years' sentence shall run from 28/01/2010.

(ii) Whether there has been a violation of the petitioner's right to a fair hearing guaranteed under article 50(2) of the Constitution.

20. The position of this Court is that if all the Petitioners wish to approach this Court for reliefs for their pre-arraignment detention, then they need to approach this Court in a formal manner, so that the intended Respondents would be granted an opportunity to be heard.

21. In the end, I find and hold that there is no new and compelling evidence presented by the Petitioners, to warrant this court exercising its jurisdiction under **Article 50(6)** of the **Constitution** to re-open the Petitioners' case for a fresh trial. For the above reasons, the petition is hereby declined and dismissed.

22. However, the Petitioners' time spent in remand shall be included in their sentence, and shall run as stated in paragraph 19 herein.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioners in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant