



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CONSTITUTIONAL PETITION NO. 2 OF 2020

BARISA WAYU MATAGUDA alias ABDUL.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

The petitioner in person

Mr. Mwangi for the respondent

RULING

Background

In accordance with the record, the petitioner was indicted with the offence of murder contrary to Section 203 and 204 of the Penal Code. In a full trial before the High Court he was convicted and sentenced to 40 years imprisonment on 20.9.2012.

Being aggrieved with both conviction and sentence, he lodged an appeal to the Court of Appeal on consideration of the appeal as framed on the grounds outlined in his appeal it was found untenable for lack of merit.

Accordingly, the Court of Appeal affirmed the conviction and sentence passed by the High Court in a Judgment dated on 27.2.2014. That dismissal prompted the petitioner to file a constitutional reference in terms of Article 20 (1) (2), 22 (1), 23, 25, 27, 35, 48, 50, 258 and 259 of the Constitution seeking a fresh trial on the basis that the sentence of (40) years imprisonment is uncontradiction of the constitution.

Determination

This petition directly fails within the ambit of Article 50 (6) (a) (b) of the Constitution which provides as follows:

(a) A person who is convicted of a criminal offence may petition the High Court for a new trial if- 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 alluded and new and compelling evidence has become available.

The question to this petition is whether or not the Court can entertain the petition and grant the remedy sought in the form of a variation of the sentence. Of primary concern is the question whether the Court has the requisite jurisdiction to adjudicate over the petitioner.

For instance, in **Samwel Kamau Macharia v Kenya Commercial Bank & 2 others Application No. 2 of 2011 {2012} eKLR** the Court stated as follows:

“A Court's jurisdiction flows from either the constitution or legislative or both. Thus a Court of Law can only exercise jurisdiction as conferred by the constitution or other written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. Where the constitution exhaustively provides for the jurisdiction of a Court of Law, the Court must operate within constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

This reasoning does address the petition, in so far as jurisdiction conferred under Article 50 (6) of the Constitution is concerned. The petitioner had on previous occasions preferred an appeal to the Highest Court for that matter - The Court of Appeal. The only rational reason

why the High Court may entertain a petition filed in terms of Article 50 (6) of the Constitution is in particular circumstances where new and compelling evidence has become available to the petitioner. One of the first tentative step in this direction was taken by the Courts in **Ramadhan Juma Abdalla & 3 others v R Nairobi Petition No. 968 of 2012 {2013} eKLR and Maurice Odhiambo Wesonga v R Petition No. 4 of 2013 and in Philip Mueke Maungi v R {2017} eKLR:**

“These Judgments undoubtedly now form part of the touchstone of the Law on new and compelling evidence, in the sense that it must not have been available to the petitioner during the trial and final reference to the Court of Appeal. One other interpretation of parts of this provision the touched new and compelling evidence could not have been obtained with reasonable diligence for use at the trial or at the hearing an appeal. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. 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 the already reached. It is clear therefore from the above passage that for purposes of a retrial evidence is new if it was not adduced in the proceedings in which the person was convicted or acquitted. It is compelling if it is reliable, substantial and in the context of the outstanding issues, and it appears highly probative of the petition against the convicted person. An inference that convicts who have been subject of a meritorious criminal process including exhaustion of their appeals to the Highest Court of Land should not as of necessity require further interference with the decisions. What must follow from this is constitutional and statutory dictate that the public interest requires finality in litigation which includes criminal litigation so that life moves on.”

The hall mark of any integrity of a criminal justice country is maintaining the public’s respect and confidence in that legal system. As **Professor Martin L. Fosedman** explains in **Connelly v D.P.P. (A.C. 1254, 1353)** :

“By preventing harassment and inconsistent results, the rule assists in ensuring that Court proceedings convinced the respect and confidence of the public. There are two remarkable aspects to this petitions.”

The concerns that the Supreme Court decision in **Francis Muruatetu v R {2017} eKLR** is equally applicable to all legal and valid sentences and punishment imposed by various Courts.

Secondly, is the clamour for convicted persons to frequently maintain their innocence, even though they have been factually found guilty by the final Court of Appeal. Certainly, justice would be served in applying the doctrine of resjudicata to shut the door to this possibility, not only in this petition, but in other cases as were both past and future.

Accordingly, it is clear that the petitioner has not justified any new and compelling evidence to call for the jurisdiction of the High Court for a fresh trial. Considering the matter as a whole, there is no merit in the petition against conviction or sentence to necessitate the constitutional adjudication. In this particular case the petition is therefore dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. The petitioner
2. Mr. Alenga for the state