



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2017

IN THE MATTER OF: ARTICLES 1(1) (3), 2(4), 19(3), 23(1) & (3), 25(C), 159(1), 160(1) & 165(3) (a) (b) (d) & (e) OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 20(1) (2) (3) & (4), 26(1), 27(1) (2), 28, 29, 30(1), 45(1), 50(2) & 51(1) OF THE CONSTITUTION

BETWEEN

HAMISI MANGALE BUREHE.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted of the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code in Chief Magistrate's Court Criminal Case No. 1396 of 2007 and sentenced to death by the Chief Magistrate's court for **count 1 and 2**, 15 years imprisonment for **count 3**, 15 years imprisonment for **count 4** and further convicted to serve 5 years imprisonment for both **counts 6 and 8** respectively. The Petitioners subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving a life sentence.

2. The Petitioner now claims that the sentencing to death by the lower court as well as the two appellate courts was a breach to his constitutional right to fair trial.

3. The Petitioner further claims that the said courts did not consider and evaluate the Petitioner's mitigation.

Response

4. The Respondents opposed the Petition by way of Grounds of Opposition The Respondents contend that the Petitioner has failed to meet the requirements of Article 50 (6) of the constitution as he has failed to demonstrate that new and compelling evidence has become available.

5. Further, the Respondents claim that the Petitioner has failed to demonstrate that his fundamental freedom or rights have been denied, violated, infringed or threatened as per the provisions of Articles 22 and 23 of the Constitution.

Hearing and Submissions

6. The Petition came up for hearing on 22nd October, 2018. **Mr. Chacha Mwita** appeared for the Petitioner while **Mr. Jami** appeared for the Respondent.

7. Mr. Chacha Mwita for the Petitioner submitted that following the celebrated decision in **Francis Karioko Muruatetu & Another –vs- Republic SC PET NO. 15 & 16 of 2015** (consolidated) the mandatory aspect of the death sentence in Section 296(2) of the Penal Code is unconstitutional. Counsel further submitted that the court has jurisdiction to hear this matter and determine the orders sought.

8. Counsel submitted that this Court has jurisdiction since the Petitioner's constitutional rights have been breached, especially the right to fair

trial. That the two Appellate Courts did not exercise any discretion in sentencing vis-à-vis the prevailing factors. It was submitted that the Petitioner has been in custody for 12 years and regrets committing the offence and that he believes he has already paid the debt to the society.

9. Counsel further submitted that the victim in the offence swore an affidavit as well as the Chairman from the Nyumba Kumi of the locality where the Petitioner resides and confirm that the Petitioner is a first offender, he is remorseful and that for the time he has been in custody is punishment enough to set aside the death sentence and lastly prayed for the orders sought for in the Petition to be granted

10. The Respondent Counsel, Mr. Jami opposed the Petition Counsel submitted that the Court has Jurisdiction in Constitutional matters and that the orders sought for in the Petition are not of constitutional matters.

11. Counsel further submitted that the Supreme Court in The Muruatetu case ordered for re-hearing of the Petitioners Case and that it must be established what “*re-hearing*” means. He submitted that Section 216 of the Penal Code requires that court receives evidence necessary before giving an appropriate sentence. Further that Section 194 and Section 198 CPC provides that the trial court may hear oral evidence which may be challenged by the rival party

12. Mr. Jami submitted that the material placed before this Court are affidavits which should be placed before the trial court where they can be challenged by opposing party.

The Determination

13. The first issue for determination is whether this court has the jurisdiction to entertain this matter. Article 22(1) of the Constitution states that every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) and 165 (3)(b) of the Constitution grants the High Court the jurisdiction to hear and determine applications for redress or denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

14. The Petitioner herein contends that the sentencing to death by the lower court as well as the two appellate courts was a breach to his constitutional right to fair trial as the said courts did not consider and evaluate the Petitioner’s mitigation and therefore the Petition falls within the Jurisdiction of this court.

15. Article 23 of the Constitution gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. It states as follows:

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

16. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by Article 165 which establishes the High Court and at sub-article (3) (b) gives the Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

17. The Petitioner clearly submitted that his criminal case had run its course. The Petitioner comes to this court seeking redress for alleged violation of his rights under the Bill of Rights. This being the case this court finds that it does have the jurisdiction to entertain this matter by virtue of Article 23 and 165 (3) (b) of the Constitution.

18. Having established that the court has jurisdiction, the next issue for determination is whether the Petitioner’s rights were infringed. He claims that the High Court and Court of Appeal did not find it necessary to consider the Petitioner’s mitigation that he was a first offender and the circumstances under which the offence was committed were also not considered.

19. On the issue of sentence, this court agrees with the Petitioner that The Supreme Court case in the case of **Francis Karioko Muruatetu &**

Another -vs- Republic [2017] eKLR declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code to be unconstitutional. The Petitioner was sentenced to 30 years imprisonment by the High Court. This sentence was set aside by the court of Appeal which imposed the death sentence. In the case, the judges of the apex court opined that a court has to take into consideration mitigation offered by the accused person in order to impose an appropriate sentence. However the court noted that the death sentence may be imposed if the court is convinced that all circumstances taken into consideration for the sentence is appropriate.

20. This Court sitting as a constitutional court cannot consider the mitigation offered by the Petitioner as against the Sentencing. I agree with the Respondents Counsel, that a Constitutional Court cannot be burdened with the work of a trial Court. Therefore in the circumstances, this Court can only direct that the file be placed before the Criminal Division of this court for reconsideration on sentencing.

21. For these reasons this Petition is hereby dismissed and orders issued as follows:

- a) The file be placed before the Kwale Chief Magistrate's Criminal Court file No. 1396 of 2007 for purposes of re-sentencing hearings.
- b) The matter be mentioned in that Court on 23rd April, 2019.
- c) The matter will be mentioned in this Court on 23rd May, 2019 for Directions.
- d) Each party to bear its own costs.

Dated, Signed and Delivered in Mombasa this 28th day of March, 2019.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Isaboke for DPP

Petitioner in person

Mr. Kaunda Court Assistant