



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 54 OF 2016**

**NEWTON NJOROGE.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner in Criminal Case No. 24 of 2009 was charged alongside one PHILLIP WAMBUA KIOKO with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. After the trial, the Petitioner was convicted of the crime and sentenced to 30 years in prison. The Petitioner preferred and lodged an appeal before the Court of Appeal- Criminal appeal No. 68 of 2014- against both the conviction and the sentence. The appeal was heard and judgment delivered on 16<sup>th</sup> October, 2015. The Court of Appeal upheld the conviction, but imposed a death sentence. Accordingly, the Petitioner has exhausted all the available appeal opportunities.

2. The Petitioner now brings this petition claiming that his fundamental rights were violated in the aforementioned trials. The Petitioner contends that Articles 23(1) and 165(3) of the Constitution bestow jurisdiction upon this court to interrogate violations of rights under the Bill of Rights. Specifically, the Petitioner claims that he was not afforded a fair hearing as envisaged by Article 50 (h) of the Constitution. In support of this assertion the Petitioner avers that he was not accorded the services of an advocate at the state's expense and as a result he suffered substantial injustice. Further, the Petitioner alleges that the above violation cannot be cured by Section 382 of the Criminal Procedure Code.

3. Also in support of the allegation that the Petitioner did not receive a fair hearing, the Petitioner claims that the evidence of PW1 and PW17 was contradictory hence could not be relied upon. The Petitioner also avers that there is new and compelling evidence that the Court should consider. The Petitioner states that there is a witness who was not available during the trial who can testify on what occurred on the material day when the offence is alleged to have occurred.

4. It is the Petitioner's case that he does not contest the conviction but rather seeks redress for violation of his rights. The Petitioner prays that the court declares that his right as expressed under Article 50(2) of the Constitution was infringed.

5. The Respondent opposed the Petition by way of Grounds of Opposition filed on 22 June, 2018. The Respondent states that the petition does not disclose any new and compelling evidence as required by Article 50(6) (b) to invoke the jurisdiction of this court.

**Submissions**

6. The Petitioner chose to file written submissions while the Respondent made oral submissions in court on 3<sup>rd</sup> July, 2018.

7. The Petitioner submitted that this court by virtue of Articles 22, 23 and 165 has the jurisdiction to entertain this matter. That being the case, the Petitioner argued that his right to fair hearing under Article 50(3) and 25(c) of the Constitution was violated. The Petitioner stated that during the course of the trial the charge was amended severally but the learned trial Judge did not comply with the provisions of Section 214 (1) of the Criminal Procedure Code.

8. The Petitioner submitted that the prosecution did not prove its case beyond reasonable doubt as contradictory evidence was adduced by the witnesses. The Petitioner called upon the Court to re-evaluate the evidence, specifically, the evidence pertaining to the Petitioner being found with the deceased's property.

9. The Petitioner urged this court to review his sentence in line with the recent Supreme Court decision in **Francis Karioko Muruatetu &**

**another v Republic [2017] eKLR.** The Petitioner contended that the sentence imposed by the Court of Appeal was harsh and inhumane. Therefore, the Petitioner opined that a non-custodial sentence or a discharge would be appropriate.

10. **Mr. Jami**, learned Counsel for the Respondent submitted that the jurisdiction of this court cannot be invoked under article 50(6) of the Constitution as there is no new and compelling evidence that could not have been obtained during the trial or during the appellate proceedings. Accordingly, Counsel argued that the Petitioner had received a fair hearing at both the trial court and the Court of Appeal. To buttress this assertion, Counsel urged the court to consider that the Petitioner was represented by an advocate during the proceedings.

11. Mr. Jami submitted that the Petitioner was inviting this court to revisit what the superior courts had already done which this court cannot do. Counsel stated that the issues being raised by the Petitioner ought to have been raised before the two superior courts.

12. On the sentence, Mr. Jami conceded that the Muruatetu case had declared mandatory death sentence to be unconstitutional. Counsel opined that this issue can be referred to the trial judge for determination. Alternatively, Counsel urged the court to defer judgment on this issue until directions are given on how petitions on mandatory death sentence should be handled.

### **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 or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Articles 23(1) and 165 (3) (b) of the Constitution grant the High Court the jurisdiction 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.

14. The Petitioner herein contends that his rights as expressed under those Articles have been infringed. Therefore, the petition falls within the jurisdiction of this court. The Respondent opined that the court lacked jurisdiction as there was no new and compelling evidence in the matter. I think the Respondent misapprehended the petition. While the petition also raises the issue of new and compelling evidence, the Petition is centered on violation of the Petitioner's right to fair hearing. Accordingly, this court finds that it has the jurisdiction to hear and determine this petition.

15. Having established that the court has jurisdiction, the next issue for determination is whether the Petitioner's rights were violated. The Petitioner avers that he was not afforded a fair hearing. He claims that the charge as drafted before the trial court was amended on several occasions but the learned trial magistrate did not comply with the provisions of Section 214 (1) of the Criminal Procedure. Section 214(1) of the Criminal Procedure Code reads as follows:

**(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**

**Provided that—**

**(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**

**(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.**

16. As I understand it, the Petitioner seems to suggest that once the charge was amended he was not given the opportunity to recall witnesses that may have already testified. I have read through the proceedings before the trial court (High Court) and the judgment delivered by the Court of Appeal. This issue was never raised in either of the courts. Be that as it may, the court notes that the Petitioner was represented by Counsel at the High Court and the Court of Appeal. None of these Counsel raised this issue. In the case of **Ramadhan Juma Abdalla & 2 others v. Republic [2013] eKLR**, Lenaola J opined that an issue should be raised at the earliest opportunity and if a litigant fails to do so the court cannot come to his or her aid. In that decision, Justice Lenaola referred to the case of **Rodgers Ondiek Nyakundi & 2 others v. The Republic, High Court at Kisii Criminal Appeal No. 135 of 2006** where Sitati, J held that:

**"There is no doubt that the Applicant had every opportunity to apply to adduce fresh evidence before or at the hearing of his first appeal. He did not do so. The door was closed and this court has no power to re-open it."**

17. The Petitioner herein had two opportunities; the High Court and the Court of Appeal to raise this issue. He did not. The Petitioner cannot therefore claim that his right to fair trial was infringed yet as expressed by Sitati J above "he slept on his right".

18. The Petitioner further claimed that there was new and compelling evidence in the matter that the court should invoke. In essence, the Petitioner was invoking the Article 50 (6) (b) of the Constitution. In my view new and compelling evidence is evidence that with the exercise of due diligence was not available during the trial. It is evidence that any reasonable man would not have been able to acquire during the course of the trial. In the Supreme Court decision in **LT. COL. Tom Martinis Kibisu v. Republic [2014]eKLR** the court defined new and compelling evidence as follows:

**"We are in agreement with the Court of Appeal that under Article 50(6), "new evidence" means "evidence which was not**

available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial”; and “compelling evidence” implies “evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict.” A Court considering whether evidence is new and compelling for a given case, 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”.

19. In this case the Petitioner contends that there was a material witness in the criminal case who resided abroad and was requesting the witness’ evidence be taken by way of affidavit. Subsequently, Justice P.J Otieno gave orders on 27<sup>th</sup> November, 2017 directing that the alleged compelling evidence by the witness visiting Kenya be availed by an affidavit. I have perused the file herein, there is no affidavit sworn by the alleged witness. How then can this Court conclude that there was new and compelling evidence? The Petitioner was given an opportunity to submit the new and compelling evidence but he failed to do so. This Court cannot order a new trial yet the Petitioner has failed to adduce the alleged new and compelling evidence.

20. The Petitioner also in support of his allegation of violation of his right to a fair hearing claimed that his conviction was based on contradictory evidence. In his affidavit, the Petitioner detailed the evidence of various witnesses that he deemed to be contradictory. The Petitioner seems to be calling upon this court to re-evaluate the evidence tendered during the trial. If this Court were to re-evaluate the evidence it would be sitting as an appellate Court. The Petitioner was tried by the High Court and later by the Court of Appeal. The Petitioner has exhausted his appellate avenues. This Court lacks the jurisdiction to re-evaluate the evidence as suggested by the Petitioner.

21. On the issue of the sentence, this court agrees with the Petitioner that the Supreme Court in the case of **Francis Karioko Muruatetu & another v 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 **Muruatetu case** the Judges of the apex court opined that a court has to take into consideration the 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 the sentence is appropriate.

22. This court sitting as a constitutional court cannot consider the mitigation offered by the Petitioner as against the imposed death sentence. The court can only direct that the file be placed before the Criminal Division of this court for reconsideration of the sentence.

23. For these reasons the petition filed on 24<sup>th</sup> October, 2016 is dismissed. Orders are issued as follows:

- a) The file be placed before the Criminal Division of this Court for reconsideration of the sentence.
- b) This Court in the exercise of its criminal jurisdiction, will hear and determine the reconsideration of sentence proceedings.
- c) Each party to bear their own costs.

**Dated, Signed and Delivered in Mombasa this 25<sup>th</sup> day of March, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Isaboke for State

Petitioner in person

Mr. Kaunda Court Assistant