REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL MISCELLANEOUS APPLICATIONS NOS. 5 OF 2014 AND 171 OF 2013

BETWEEN

DUNCAN KYALO MUANGE.....1ST APPLICANT

JACKSON MUTUNGA KIMATU.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants herein, a herein, **Duncan Kyalo Muange** and **Jackson Mutunga Kimatu** are both inmates at Kamiti Maximum Prison who were convicted of the offences of Robbery with Violence and Sentenced to death. The said sentence has however been since commuted to life sentence.

2. They have filed these proceedings seeking a declaration that their case be retried afresh.

3. From the applications which though dubbed petitions were, for some reasons opened at miscellaneous applications, the applicants aver that the gist of their applications revolve around the discovery of the incompleteness of the evidence relied upon by the courts in convicting them and further upholding of the said convictions. In Machakos High Court Criminal Appeals Nos. 100A and 100B and 193 of 2003 and the Court of Appeal Criminal Appeal No. 155 of 2003.

4. It was the applicants' case that the Respondent purposely, knowingly and wilfully adduced incomplete and questionable evidence and suppressed exculpatory evidence thus causing the court to link the applicants to the crimes in question. It was contended that the Respondent tendered selective information to the court thereby misleading the court into arriving at its decision based on incomplete evidence. Accordingly, the Respondent was accused of non-disclosure of relevant and important facts which, had it been disclosed would have informed the court in reaching a just and fair decision. The applicants contended that this action on the part of the Respondent geared towards securing a conviction was a clear violation of the law. It was their position that the said act of concealment was not within the knowledge of the applicants at the time of the trial and that

5. In the foregoing premises the applicants contended that it is only fair and just that a new trial be ordered.

6. The applications were based on inter alia Articles 258(1) and 259 of the Constitution.

7. I have perused the record of the applications and I have not seen any reply by the Respondent. In fact, **Ms Mogoi** Learned Prosecution Counsel on 27th May, 2019 informed this court that she did not intend to file anything in the matter since the record was clear that the orders of **Nyamweya, J** were complied with hence there was nothing further to be done as the Director of Public Prosecutions had fully complied. The said order of **Nyamweya, J** was in respect of the Notice of Motion dated 13th February, 2015. On 17th January, 2019, I directed the parties herein to file submissions in respect of the main petition.

8. However, only the applicants filed their submissions which are directed at the Notice of Motion dated 13th February, 2015, an application where the applicant is only the first applicant herein, **Dancum Kyalo Muange**. Since none of the parties before me has addressed his mind to the petition contrary to my directions, I will therefore deal with the issue whether or not the Respondent has fully complied with the order of **Nyamweya, J**. The said order was given on 29th September, 2015 and by the said order the learned Judge directed the OCS Kasarani Police

Station to investigate the applicant's complaints and to take the necessary action.

9. On 25th June, 2018, this Court directed the DPP to appear and shed light on the progress of the said investigations. On 23rd July, 2018, pursuant to the said order, the court was informed that the DPP called for the investigations file from Kasarani Police Station and it was revealed that pursuant to the order of **Nyamweya, J** aforesaid, Inquiry No. 6 of 2016 was instituted in which statements were recorded from the applicant and his witnesses, the in charge of Kamiti Prison, The Clinical Officer, Kamiti and **Sergeant Eugene Shibeka**. From the analysis of the evidence tendered, no substance was found in the alleged assault by the applicant and it was recommended that the file be closed.

10. However, the DPP upon perusing the file identified outstanding areas that required further investigations and directed the same to be undertaken. Accordingly, the court gave a further date for mention. On 27th November, 2018, **Miss Mogoi**, learned prosecution counsel reported that following further investigations pursuant to the directions of the DPP, it was concluded that there were no sufficient grounds to charge the officers against whom the complaint was directed hence the file stood closed.

11. Article 51(1) of the Constitution provides that a person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned. It therefore follows that a prisoner is entitled to the enjoyment of all the rights and fundamental freedoms in the Bill of Rights. However, such rights may be restricted where their enjoyment is incompatible with his status of being a prisoner and therefore any particular right or a fundamental freedom is incompatible with that status. That being a restriction of the fundamental right, it is my view that for the same to be justified it must conform to Article 24 of the Constitution and particularly Article 24(3) which states that the obligation to demonstrate to the court, tribunal or other authority that the requirements of the Article have been satisfied lies on the State or the person seeking to justify a particular limitation.

12. In other words, where a prisoner complains that he has been assaulted, he only needs to prove the fact of unlawful assault which amounts to a violation of his right and then the burden shifts to the State to justify the same. In my view therefore prisoners are entitled to the right to dignity under Article 28 of the Constitution and as was held in **Francis Coralie Mullin vs. Administrator, Union Territory of Delhi (1981) SCR (2) 516,** cited in **Ahmed Issack Hassan vs. Auditor General [2015] eKLR**:

> **"…the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights…put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated."**

13. That the right to dignity is central in the Bill of Rights is clear from Article 19 of the Constitution which provides that:

> **(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.**
>
> **(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.**
>
> **(3) The rights and fundamental freedoms in the Bill of Rights—**
>
> > **(a) belong to each individual and are not granted by the State;**
> >
> > **(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and**
> >
> > **(c) are subject only to the limitations contemplated in this Constitution.**

14. As is expressed by **Albie Sachs** in ***The Strange Alchemy of Life and Law*** (OUP) at page 213:

> **"Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the "haves" can continue to have, but to help create conditions in which the basis dignity of the "have nots" can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice."**

15. It is therefore my view that subject to the limitations that go with the fact of their being detained, imprisoned or in custody, a person who is detained, held in custody or imprisoned under the law must be treated with dignity. Assault, unless justified under the law cannot in my view be treated as a restriction that is compatible with the fact of one's detention, imprisonment or being held in custody. If therefore it is found that a prisoner, detainee or a person in custody was unlawfully assaulted, the person would be entitled to a remedy in law. Article 48 of the Constitution provides that the State shall ensure access to justice for all persons while Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Therefore, if the applicant alleges that he was assaulted while in

custody, he is entitled to the right to access justice in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

16. However, this Court cannot compel the Director of Public Prosecution to undertake the prosecution of a person against whom the applicant complains. This is so because Article 157(10) of the Constitution provides that:

> **The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**

17. However, under Article 157(11) the DPP is obliged, in exercising the powers conferred on him by the said Article, to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Nothing therefore bars the court from intervening where the DPP's powers are not being exercised in accordance with the dictates of the Constitution.

18. In this case, the DPP initiated the process of investigations and found whether rightly or wrongly that there was no sufficient evidence to commence criminal proceedings based on the applicant's complaint. I have not been given any material on the basis of which I can find that the DPP's decision was tainted with disregard of the public interest, the interests of the administration of justice or that it amounted to an abuse of the legal process.

19. In those circumstances, if the applicant is aggrieved by the said decision, his option is to resort to private prosecution. In that event, the investigative agencies would be under an obligation to turn over to him the material gathered during their investigations unless otherwise authorised by law. Long before the promulgation of the current Constitution, it was held in **David Kariuki Mutura vs. Republic [2005] eKLR** it was held that:

> **"These witnesses were not called to testify. In the case of GEORGE NGOSHE JUMA & ANOR VS ATTORNEY GENERAL, MISC. CRIMINAL APPLICATION NO. 345 OF 2001, the Constitutional Court held that the prosecution has a duty to bring before Court all the evidence gathered to ensure that justice is done. The prosecution cannot be allowed to suppress evidence in their possession even if it is in favour of the accused. Unfortunately this what seems to have happened in the instant case. The investigating officer was selective in the evidence he wanted adduced before Court. There was evidence recorded from witnesses that was in favour of the Appellant. This evidence was suppressed for no apparent reason. I think in this regard the Appellant's complain that the Learned Trial Magistrate erred in disregarding the fact that the prosecution had deliberately suppressed the evidence of the eye witnesses to the accident despite having taken statements from them has some justification. I think that in those circumstances, the trial Magistrate ought to have drawn the necessary inference that the evidence that would have been adduced by the said witnesses would have been unfavorable to the prosecution case."**

20. In **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, the Court of Appeal held that:

> **"The prosecution, at the beginning of his trial, supplied the defence with all the relevant material upon which they intended to rely. That was perfectly right because that material was gathered by the police using the resources provided by tax-payers among whom is the appellant. That material is not the personal property of the police and the police are under a legal duty to gather it on behalf of the public. Of course, no busy-body would be entitled to demand to see that material, unless there be some very good reason for such a demand. But the appellant was a party directly involved in the affair and as public property directly affecting him, he was entitled to. The police were under a legal duty to pass that material to the Attorney General and the Attorney General, who is, in all criminal cases, the prosecuting authority was bound to disclose it to the appellant before his trial and throughout the trial. If the Attorney General received any new information during the trial the Attorney General was bound by law to disclose it. This is because the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused."**

21. Under the current constitutional dispensation Article 35(1) of the Constitution provides as follows:

> **(1) Every citizen has the right of access to—**
>
> **(a) information held by the State; and**
>
> **(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

22. Addressing the right to information, the Court in Petition No. 479 of 2013 - **Rev. Timothy Njoya v. Attorney General & Another; [2014] eKLR,** held that:

> **"A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In Nairobi Law Monthly v. Kengen (supra) the Court dealt with the applicability of the right to information as follows;**
>
> **'The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to**

information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest...this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state"."

23. The South African Constitutional Court in **The President of RSA vs. M & G Media (CCT 03/11) [2011] ZACC 32** expressed itself at para 10 as hereunder:

> **"The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."**

24. In **Brummer vs. Minister for Social Development and Others(CCT 25/09) [2009] ZACC 21** it was noted at para 62 as follows:

> **"[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."**

25. In this case, if the applicant requires the information gathered by the investigative agencies who are agents of the State, in order to pursue his rights and fundamental freedoms, then the Respondent is under a constitutional duty to furnish the same unless there is any justifiable hindrance to the said disclosure.

26. However, whereas the applicant is properly within his right to pursue his rights in a court of law, in the circumstances of this case, I am unable to interfere with the decision made by the Respondent.

27. Consequently, the Applicant is at liberty to pursue his options in appropriate proceedings rather than in these proceedings. For avoidance of doubt the petition herein still remains to be determined.

28. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

The Applicant in person

Ms Mogoi for the Respondent

CA Geoffrey