



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 3 OF 2016

IN THE MATTER OF ARTICLES 20(1), (2), 22(1) (3)(E) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER ARTICLES 23(1), (3) 25(A) (B) (C), 27(1), 25(3), 28, 29(A)(C)(E), (35)(1)(2), 48, 50(1) (2) (P) (Q) (6)(A) AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 258(1) AND 159(1)(3) OF THE GENERAL PROVISIONS OF THE NEW CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 204 AND 259 OF THE PENAL CODE SECTION 216, 329 AND 137(1)(2)(A) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

BARISA WAYU MATAGULA.....PETITIONER

VERSUS

DEPUTY DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the Respondent

JUDGEMENT

The Petitioner herein was charged in HCCR No.6 of 2008, tried and convicted of the offence of murder as defined in terms of Section 203 and punishable in Section 204 of the Penal Code. He was thereafter sentenced to 40 years imprisonment. Having been dissatisfied by both the trial court and the Appellate court the Petitioner has now brought the instant petition seeking review, re-hearing and that the evidence be recorded afresh. It is hinged upon Article 50(1), (2) and 6(a) & (b).

As encapsulated in the grounds of Petition, the Petitioner complains about the age of the offender at the time of commission of the offence and at the time the matter was heard, that the petitioner did not benefit from the fact that he was a first offender, that there is new and compelling evidence which the court did not consider when the matter being heard at the trial court and that the proof tendered by the prosecution did not suffice to connect him to the alleged offence. On the matter of new compelling evidence, he states complains about the admissibility of electronic evidence in criminal proceedings and this was in breach of section 78(1)of the evidence Act, Cap 80 laws of Kenya.

In his supporting affidavit annexed to the Petition dated 15th of December 2015, the Petitioner notes that albeit the fact that this Honorable Court's Jurisdiction invoked in terms of Article 50(1), (2) and 6(a) & (b) of the Constitution of Kenya does not lie, for it requires one to demonstrate the existence of new and compelling evidence which is not the case herein, the Petitioner is not relying on the same. He is

pointing out errors omitted during trial, misdirection by the courts, incorrect application of the law and breach of the rights and fundamental freedoms.

The Petitioner avers that he has exhausted all his rights of Appeal and in case of any grievances raised after the said exhaustion of appellate rights can only be directed to the Constitutional Court for the interrogation of constitutional avenues. In the Petitioner's view, this leads to the consideration of Article (Section) 84 of the defunct constitution which this court ought to take a judicial notice that it has been construed and applied by courts of concurrent jurisdiction. Further that the cause of action which arises in this petition survives the transition and this Hon. Court is properly seized of the matter as is provided under article 262 of the Constitution of Kenya 2010.

He has brought to the attention of the court the fact that he has suffered poor legal representation during both trial and at the appellate stages prompting his to file the instant petition. Further that the 40 years imprisonment meted upon him does not commensurate with the fact that he is a first offender and with his age thereby causing a miscarriage of justice on him.

On prayers sought, the Petitioner seeks the court's intervention to substitute the sentence with a less severe form of punishment or remitting all or part of the sentence or replace or alter the sentence either probation or a community service order (C.S.O) or a free or non-custodial remission of the sentence to consummate and factor in petitioners age and length of the sentence or review of the sentence starting from the date of arrest.

The Law, Analysis and Determination.

The instant petition is heavily anchored 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.

What is of utmost importance is to consider whether the petition has met the threshold as provided for in the above-mentioned article to warrant the court order for any of the reliefs sought by Petitioner who has already been convicted and sentenced to forty (40) years imprisonment. He has also appealed to the court of appeal and the same was dismissed was dismissed for want of merit.

In **Tom Martins Kibisu -Vs- 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.’

In view of the foregoing decision, the Petitioner herein appealed to the Court of Appeal against the both conviction sentence meted by the High Court. Therefore, he has exhausted all the available appeal mechanisms open to him and in that respect the first requirement has met the test.

On the 2nd limb, the Petitioner must show by way of sufficient proof that he has found new and compelling evidence. In that regard, in **Tom Martins Kibisu -Vs- Republic (supra)** the Supreme stated 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.”

In the instant case, the Petitioner seems to be saying that he is not relying on this ground. But however, when finalizing his petition, he seems to be saying that there is new and compelling evidence which pertaining to the admissibility of the CCTV footage produced as evidence. He says that bought the trial court and the appellate court acted in violation of the general of the general rules on admissibility of electronic evidence in criminal proceedings. In my view this is a point of law as opposed to a violation of human rights and fundamental freedoms. The same was dealt with both at the trial court as well as on appeal. The Petitioner has not given any piece of new and compelling evidence which may suffice the award of the reliefs sought. Hence in my view this particular limb fails.

On fundamental rights and freedoms, the Petitioner complains that his right to fair trial was violated because even in the presence of

mitigating circumstances that he was a first offender, he was the sole bread winner and his age, both the trial court and the Court of Appeal still subjected him to a severe sentence. In my view, this was a case which involves loss of life under quite aggravating circumstances, hence purposes of deterrence of future offenders, the said courts meted the impugned sentence. Further, I find that the sentence was proportional to the circumstances of his case. I find that his rights and fundamental freedoms were not violated since he took someone's life with his own wrongful act.

In view of the foregoing, this court finds that this petition fails for the lack of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE