



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL PETITION NO. 10 OF 2015

MOHAMED ABDI alias KAUNI PETITIONER

VERSUS

REPUBLIC RESPONDENT

RULING

1. Before me is a petition filed by the petitioner **Mohamed Abdi alias Kauni** on the 13th July 2015 under Article 21, 22, 48 and 50 of the Constitution of Kenya 2010 seeking a number of declarations, that is –

(1) That the court be pleased to grant a declaration that his constitutional rights and fundamental freedoms were infringed by the Republic in trying, convicting and sentencing him.

(2) That the court be pleased to make a declaration that his constitutional rights and fundamental freedoms had been breached by the Republic by convicting him unlawfully.

(3) That the respondent be ordered to release him as he had served more than ten (10) years in prison.

(4) That the costs be waived in favour of the petition in any event.

2. The petitioner also filed an amended petition and grounds of mitigation of sentence. He relied on a case of **Francis Muruwatetu & Another vs Republic** wherein the Supreme Court concluded that the provisions of the written law of a mandatory death penalty run counter to the constitutional guarantees protected under the rule of law. Further he filed written submissions in support of his petition.

3. At the hearing of the petition, the petitioner relied on his amended petition and the written submissions and asked for mercy from this court as he was sick.

4. Mr. Okemwa learned Principal Prosecuting Counsel urged this court to go through the record and make its own decision.

5. This petition arose from the criminal case in which the petitioner was tried by the Principal Magistrate's Court at Wajir in Criminal Case No. 77 of 2005. He was convicted together with two (2) others on 1st August, 2006 and sentenced to suffer death in accordance with the law by being hanged until he was completely dead.

6. He was dissatisfied with the trial court's decision and appealed to the High Court in Meru High Court Criminal Appeal No. 120 of 2006 which was also dismissed by the High Court on 7th February 2008.

7. He again appealed to the Court of Appeal in Criminal Appeal No. 119, 123 and 124 of 2008. His appeal together with the appeals of his two (2) co-appellants was dismissed on 19th November, 2010.

8. He was now come to this court through a Constitutional Petition seeking the orders that I have listed above.

9. The appeal of the appellant having been determined by the High Court and the Court of Appeal, this court has no jurisdiction ordinarily to reopen the matter except under Article 50 (6) of the Constitution of Kenya where there is discovery of new and compelling evidence which a petitioner did not have or was not able to have at the time of trial. The petitioner herein has not alleged a discovery of new and compelling evidence. This court cannot thus exercise its powers under Article 50 (6) of the Constitution of Kenya 2010.

10. In the amended petition, the petitioner has relied on a decision of the Supreme Court in which it was stated that the death penalty should not be mandatory. I am aware of the case of **Muruwatetu (Supra)** that was recently determined by the Supreme Court. However, my view is

that, that decision did not operate retrospectively. Its effects operate from the date it was pronounced and thereafter not before that date.

11. Secondly, sentencing is the discretion of the trial court, taking into account various relevant circumstances of the case including the mitigation of an accused person. This court in my view is not placed in a suitable position to determine the appropriate sentence through a Constitutional Petition. In my view, the appropriate sentence should be determined by the respective trial court unless there is a mistake by the trial court in sentencing, and in this case I have not been told that there was, nor do I find any mistake by the trial court in determining the sentence that it handed down to the appellant and his other two (2) co-accused.

12. With all the above considerations in mind, I find that this petition lacks merit and I dismiss the same.

Dated, Signed and Delivered at Garissa this 29th June, 2018.

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George Dulu

JUDGE