



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CONSTITUTIONAL PETITION NO. 22 OF 2015

ATHUMAN SHUSHE BAHOLA PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC

PROSECUTION RESPONDENT

JUDGEMENT

The petitioner was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that the appellant on 8.1.2010 at Bononi Village in Tana River District murdered Fatuma Ali. The trial court convicted the appellant and sentenced him to suffer death. The petitioner filed a criminal appeal before the Court of Appeal and the same was dismissed on 13.2.2014.

The current petition in verbatim seeks the following order: -

That, this Hon. Court be pleased to grant a declaration that I the (defendant) herein the petitioner's constitutional rights have been breached and contravened by the respondent by excluding the defendant to participate on my own trial by allowing written submission to be filed to the High Court registry by the counsel, issue that greatly prejudiced the defendant's rights to a fair trial.

The appellant filed written submissions in support of his petition. It is submitted that Article 50 (2) of the Constitution provides that an accused person is to be present when being tried. The petitioner contends that the trial court allowed the defence counsel to file written submissions in a criminal case yet the petitioner was not present and this made the trial not to be fair. It is submitted that the Court of Appeal in the case of **ROBERT FANALI AKHUYA V REPUBLIC**, C.A. Criminal Appeal No. 42 of 2002, Kisumu outlawed the filing of written submissions. Therefore, the submissions filed by the defence counsel were not within the law. It is also submitted that section 213 of the Criminal Procedure Code gives the right of reply to the state if the accused gives evidence. The words used under section 213 and 210 of the Criminal Procedure Code are "**address the court**". The meaning of that phrase is that the advocate of the accused shall talk or lecture the court audience instead of filing written submissions. Final submissions are supposed to be made orally in court after the completion of the case. The accused should also be present to hear them.

The petitioner further submits that Article 28 of the Constitution provides that every person has the right of dignity and the right to have that dignity respected and protected. The death penalty violates that

rights. The essence of punishment is to rehabilitate and reintegrate the convict to the society. The death or life sentence infringes the prisoner's right to human dignity. The sentence effectively denies the petitioner the possibilities of rehabilitation. The only hope is presidential pardon but that one is not guaranteed as it is not a constitutional right. Under section 47 (6) of the Uganda Prison Act (Cap. 304 Laws of Uganda) it is provided as follows: -

“for the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years imprisonment”

The petitioner submit that his constitutional rights under Articles 20, 21, 22, 28 and 50 were breached and contravened by the respondent due to the continued detention in prison. The court should order for the release of the petitioner from prison.

The State opposed the petition and relied on the replying affidavit of David Fedha sworn on 17.3.2016. It is stated that the death sentence is provided under section 204 of the Penal Code. The petition does not raise any new and compelling evidence to be considered by this court.

The record of the trial court show that the appellant was put on his defence on 10.3.2011. The petitioner gave his unsworn defence on 8.6.2011 and closed his case. The defence counsel asked the court to be allowed to file written submissions. The matter was listed for mention on 30.6.2011. On that date the petitioner was present, Miss Chepkwony was also present for the accused and Mr. Naulikha appeared for the State. The record indicates that the defence counsel had filed written submissions and the matter was listed for judgement on 20.9.2011. It is therefore clear that on the date the matter was listed for mention to confirm whether written submissions had been filed, the petitioner was present. It is not true that the petitioner was not present when the court dealt with the issue of submissions.

The petitioner was charged with the offence of murder. The record shows that he was represented by a counsel who cross-examined all the twelve witnesses who testified. It was the advocate who was well versed with the case. The advocate requested the court to file written submissions in support of the defence case. The petitioner cannot fault the advocate by alleging that he did not know what the submissions were all about. The decision of the Court of Appeal on the issue of written submissions is no longer good law. Even the court of Appeal currently allows parties to file written submissions. The assumption is that the advocates and their clients would discuss the submissions and reduce them into writing. This aspect of practice saves the court ample time and also gives an opportunity to litigants to elaborate at length their thought on the matter through written submissions. This is a better process as opposed to oral submissions where the court can limit the time given to each party to submit. The length of written submissions can also be limited but litigants and their advocates are given ample time to reduce their oral thoughts into writing. The petitioner filed an appeal before the Court of Appeal and the same was dismissed. The issue of written submissions cannot be a new and compelling evidence. There is no violation of the petitioner's constitutional rights.

On the issue of the death penalty, the current status is that the death penalty is still part of our laws. Section 204 of the Penal Code provides for the death penalty. Section 296 (2) of the Penal Code also provides for the death penalty in cases of robbery with violence. Article 26 of the Constitution provides for the right to life. Article 26 (3) provides that life shall not be deprived except to the extent authorized by the Constitution or other written law. This means that the Constitution does recognize that the death penalty is still part of the Kenyan law. The issue of death penalty is still pending before the Supreme Court. Before the Supreme Court gives its verdict on the death penalty, Subordinate Courts and superior Courts will keep on utilizing the sentence as it is part of our laws.

In the end, I do find that there is no violation of the petitioner's constitutional rights. There is no new and compelling evidence for consideration by the court. The petition lacks merits and is hereby dismissed.

Dated, signed and delivered in Malindi this 21st day of March, 2017,

S.J. CHITEMBWE

JUDGE