



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONST. PET. NO. 2 OF 2014**

**JAMES KAZUNGU LUGHANJE.....PETITIONER**

**=VERSUS=**

**DIRECTOR OF PUBLIC PROSECUTION.....PROSECUTION**

**J U D G M E N T**

The petitioner was charged with the 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 the 25<sup>th</sup> day of January 2009 at Midodoni village, Gongoni Location within Malindi District of the Coast Province, jointly with others not before the court, murdered Albert Mlanda Lughanje. The appellant was convicted by the High Court and sentenced to death. The petitioner's appeal no. 39 of 2011, Malindi Court of Appeal was disallowed vide a Judgment delivered on 21<sup>st</sup> March 2014.

The current petition by the petitioner indicate that the petitioner's constitutional rights and fundamental freedoms were violated during the trial. The petitioner relied on his petition and written submissions. From the petition and the submission, it is contended that the record of the trial court for 22<sup>nd</sup> July 2009 does not capture the quorum properly. It is not indicated whether the prosecutor was present and what was his rank; secondly, the petitioner maintains that he was not sent for psychiatric medical examination. No medical report on his mental status was produced. Further, the demeanour of the main witness, PW6 was doubtful. The witness was a fellow suspect and his evidence ought not to have been considered.

The Petitioner further contends that the first report did not mention his name. The occurrence book (OB) report number 71/25/1/09 did not give his name. It is further stated that the petitioner's alibi defence shifted the burden of proof to the prosecution. Lastly, the petitioner argues that the death sentence is unethical. It is inhuman and degrading punishment contrary to the provisions of the constitution.

The petitioner maintains that there were many mistakes during the trial. The errors led to his conviction.

Mr. Nyongesa, prosecuting counsel opposed the petition counsel maintains that all what is being raised were heard and determined by the court of appeal. The court of appeal considered the alleged alibi defence. There is no law requiring mental assessment of an accused person.

The petitioner maintains that he was not taken for mental assessment before the trial was conducted. Section 11 of the Penal Code, Chapter 63, Laws of Kenya, states as follows:

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proven.

The petitioner is not alleging that he is of unsound mind. Since the trial was conducted and he does not alleged or did not allege that he was mentally unsound, I do find that the petitioner was fairly tried. There is no violation of his rights with regard to the quorum of 22<sup>nd</sup> July 2009, it is clear that the case proceeded and witness testified. A prosecutor must have been present as witnesses were led to their evidence. This cannot be a ground for a constitutional petition.

Similarly, the contention of the petitioner's alibi defence, the alleged errors on the record of the trial court as well as the evidence of a suspect are all issues that could be raised during the appeal. It cannot be a ground for a constitutional petition. The same applied to the OB and the first report. These are all grounds of appeal.

The petitioner should know that even though the High Court is empowered to deal with issues relating to enforcement of the Bill of Rights under Article 22 of the Constitution, it is not the duty of the High Court to hold that the same High Court violated the petitioner's rights during the hearing of the petitioner's murder case or any other case. The only avenue for the petitioner is to file an appeal. In this case an appeal was preferred and subsequently disallowed. This court can only entertain applications brought under Article 50(b) if there is a new and compelling evidence. The presumption is that the trial courts will dispense justice as per the law. The courts cannot be the ones being accused of violating the petitioner's rights. If a court in its proceedings violates one's constitutional rights, the recourse to such a party is to appeal to a superior court.

Lastly, the contention that the death sentence is unethical cannot be a ground for the petition. Section 204 of the Penal Code states that anyone convicted of murder shall be sentenced to death. Similarly, Article 26 of the Constitution on the right of life acknowledges that one's life can be deprived if it is permitted by the law. Section 204 of the Penal Code is the law which permits the deprivation of the lives of those convicted of murder.

In the end, I do find that the current petition does not raise any new issues. There was no violation of the petitioner's rights. The petition is hereby dismissed with no orders as to costs.

**Dated and delivered in Malindi this 15TH day of FEBRUARY 2016**

**S.CHITEMBWE**

**JUDGE**