

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 7 OF 2015

BAHATI ALI CHENGO PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

JUDGEMENT

The petition herein was filed on 18th May, 2015. The main orders being sought are that the petitioner's constitutional rights were violated as the trial court ought to have invoked the provisions of Section 179 (2) of the Criminal Procedure Code and find the petitioner's guilt of manslaughter instead of murder. The petitioner filed written submissions and is emphasizing on the point that his constitutional rights to a lesser punishment has been contravened. The conviction ought to be substituted with that of manslaughter and he be sentenced to a term in prison as opposed to the death sentence.

Mr. Nyongesa, prosecution counsel, opposed the petition. Counsel submitted that the issue of the sentence was dealt with by the court of Appeal. The death sentence is provided for under the law. The petitioner was convicted of murder. There is no compelling evidence being brought in by the petition.

The record shows that 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 petitioner murdered Karisa Chengo Chome on 31.1.2008 at Ivoka Village in Chakama Location within Malindi District. The petitioner was convicted on 28.7.2010 by Justice H.A. Omondi and sentenced to death.

The petitioner appeal to the Court of Appeal vide Criminal Appeal No. 295 of 2010. The Court of Appeal upheld the conviction in its judgement delivered on 16.12.2013. The Court of Appeal held that the evidence against the appellant was overwhelming and credible.

The main issue being raised by the petition relates to sentence: The petitioner has cited the case of **JAPHET JUMAA HENZO V REPUBLIC**, Mombasa Criminal Appeal No. 96 of 2007 whereby a two Judge bench of M. Odero J and F. Tuiyott J set aside a death sentence and replaced it with ten (10) years imprisonment. I have read that judgement and it involved a case of robbery with violence. The court held that although the victim was attacked, no medical evidence was produced. The victim did not suffer any injuries. Although the court did not reduce the charge to that of simple robbery, it still did set aside the death sentence and replaced it with ten (10) years imprisonment. The petitioner is also relying on the case of **REPUBLIC V AMOS KARUGA KARATU** Nyeri High Court Criminal Case No. 12 of 2006 where Justice Makhandia by then Judge of the High Court freed the accused as he had stayed in custody for five (5) months before being charged in court.

The petitioner herein was charged with the offence of murder. The evidence shows that the incident occurred at about 4.00 pm. The deceased's wife was present and she testified as PW1. Section 204 of the Penal Code states that any person convicted of murder shall be sentence to death. Similarly, Article 26 (3) of the Constitution provides for deprivation of life under the law. Section 296 (2) of the Penal Code states that the punishment for robbery with violence is death sentence.

Given the petition herein, I do find that the same does not raise any new or compelling evidence.

The death sentence is still lawful. This court cannot simply hold that the petitioner ought to have been found guilty of manslaughter and sentenced to a firm in prison. Section 179 of the Criminal Procedure Code cannot apply as the petitioner was found guilty of murder.

In the end, I do find that the petition herein lacks merit and is hereby dismissed.

Dated and delivered in Malindi this 31st day of March, 2016.

S. CHITEMBWE

JUDGE