



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 15 OF 2015

EDWIN CHAGALI MUSIEGAPETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGEMENT

The petitioner was charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence for each count were as follows: -

Count I: On the 4th day of December 2007 at changamwe area in Mombasa District within Coast Province, jointly with others not before court while being armed with a dangerous or offensive weapon namely a pistol robbed Samuel Kagwi Ngure of his cash Kshs.1,000/=, mobile phone make Nokia serial number 355 698 001 842 625 valued at Kshs.5,498/=, two Standard Chartered Bank ATM card, one Kenya Commercial Bank ATM card, one Barclays Bank card, and National identification card all valued Kshs.7,900/= and at or immediately before or immediately after the time of such robbery used personal violence against the said Samuel Kagwi Ngure.

Count II: On the 4th day of December, 2007 at Changamwe area in Mombasa District within Coast Province, jointly with others not before court while being armed with dangerous or offensive weapon namely a pistol robbed Peter Kimani Wanjugu of his Kshs.34,000/= and a phone make Sony Erickson all valued of Kshs.42,500/= and at or immediately before or immediately after the time of such robbery used personal violence against the said Peter Kimani Wanjugu.

The petitioner's case, Criminal Case No. 3957 of 2007, was fully heard before the chief Magistrate's Court at Mombasa. The trial court found the petitioner guilty of both counts and on 3.9.2008 the petitioner was sentenced to suffer death.

The petitioner filed Criminal Appeal No. 254 of 2008 before the Mombasa High Court. On 21.12.2012 a two Judge bench dismissed the appeal. The petitioner opted to proceed to the Court of Appeal and filed Criminal Appeal No. 79 of 2014 before the Mombasa Court of Appeal. The second appeal suffered the same fate vide a judgement delivered on 15th May, 2015.

By his petition filed on 30.6.2015, the petitioner is seeking to have his conviction and sentence set aside and he be released from prison. He is seeking a declaration that his constitutional rights were violated as

his human dignity has not been upheld. His rights under Articles 20, 21, 22, 23 and 50 of the 2010 Constitution were violated and that he was condemned to life in prison for the rest of his life.

The petitioner filed written submissions in support of his petition. He contends that he was entitled to benefit from the less severe sentence under Article 50 (2) (p) of the Constitution. Although the petitioner was armed with a pistol, the complaints were not harmed. The petitioner further states that Section 179 (2) of the Criminal Procedure Code was applicable and the trial court ought to have reduced the charges to a minor offence.

The petitioner further submit that his right to dignity and to have that dignity respected under Article 28 of the Constitution were violated.

The state opposed the petition. The state contends that there is no new and compelling evidence introduced by the petition, the issues being raised are res-judicata and that the application is an abuse of the court process.

I have carefully read the petition and the submissions of the petitioner. There is no complaint on the conviction. The only issue being raised is that the sentence is harsh and that since the victims were not harmed, he ought to have benefited from the provisions of Section 179 (2) of the Criminal Procedure Code and a lesser sentence imposed instead of the death sentence.

The judgement of the High Court in appeal No. 254 of 2008 at page 6 clearly explained to the appellant the ingredients of the offence of murder. The court explained to the appellant that where robbery is perpetrated by more than one person, the offenders are armed with a dangerous weapon(s) and actual violence or threat of violence is used, then robbery with violence is proved. The presence of any one of those ingredients fulfils the requirement of proving robbery with violence. The petitioner concedes that the robbers were armed with a pistol. The High Court noted that there were four robbers including the petitioner. The case was therefore proved.

With regard to the issue of violation of the petitioner's constitutional rights, the Court of Appeal judgement (Appeal No. 79 of 2014) did decide that none of the petitioner's constitutional rights were violated.

Under Section 296 (2) of the Penal Code, the sentence for robbery with violence is the death sentence. The victim of the robbery must not be harmed or injured for the offence to be proved. Whenever the robbers are two or more, already the offence becomes violent even if the two robbers are not armed. Whenever the robbers are armed with offensive or dangerous weapons, the offence becomes robbery with violence even if the weapons are not used or the victim is not injured, similarly if there is violence or threat of it during a robbery, the offence automatically becomes robbery with violence even if the threat or violence is not exerted upon the victim of the offence or the threat of violence does not actualize into violence. Any one of the above scenarios is sufficient to prove robbery with violence.

In essence therefore, the petitioner could not have benefited from the provisions of Section 179 (2) of the Criminal Procedure Code. The offence could not be reduced to simple robbery. The sentence for robbery with violence under Section 296 (2) of the Penal Code is death. Article 26 (3) of the Constitution indirectly recognizes the lawfulness of the death penalty.

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

Dated and delivered this 30th day of May, 2016.

S.J. CHITEMBWE

JUDGE