



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CONSTITUTIONAL PETITION NO. 26 OF 2015

DAVID GICHURE KANYORO PETITIONER

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The petitioner was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that the petitioner and one Simon Muchiri Waititu on the 19th September, 2002 at about 6.45 pm at Maji Ya Chumvi, Kilifi County while armed with dangerous weapons namely pistols, robbed Benson Matano Kazungu of motor vehicle registration number KAP 546E Toyota saloon valued at Kshs.540,000/= and at or immediately before or immediately after the time of the robbery threatened to use actual violence on the said Benson Matano Kazungu.

The petitioner and his co-accused were found guilty of the offence and sentenced to suffer death. The petitioner filed Criminal Appeal number 229 of 2003 while his co-accused filed appeal number 228 of 2003 before the Mombasa High Court. The appeals were consolidated, heard and dismissed vide a judgement delivered on 5th October 2004. Once again the petitioner and his co-accused filed Criminal Appeal number 265 of 2005 before the Court of Appeal at Mombasa. The appeal was dismissed on 28th July 2006.

In the current petition, the petitioner submit that his constitutional rights were violated. He has cited Articles 20, 23, 25, 26 and 165 of the Constitution. The grounds upon which the petition is brought are that the trial was not fair because the petitioner was not supplied with the original charge sheet or witness statements. It is also submitted that the trial was not fair as it was conducted by a police officer below the rank of assistant inspector in some occasions. This was contrary to the provisions of section 85 (2) of the Criminal Procedure Act. Further, the petitioner contends that he was tortured badly and even the trial court ordered that he be taken to hospital. Article 50 (4) of the Constitution was violated.

During the hearing of the petition, the petitioner informed the court that he has not come under Article 50 of the Constitution. All what he is seeking is his sentence to be checked afresh. This is a petition and not an appeal.

Mr. Monda, prosecution counsel, opposed the petition. Counsel submitted that the issue of the death penalty is pending before the Supreme Court.

The background of the petition shows that the petitioner has exhausted the appeal process. His contention is that he has not filed the petition under Article 50 of the Constitution. He is not alledging that there is new and compelling evidence necessitating a fresh hearing of the case. His contention is that his rights were violated. The original case and the two appeals were heard and determined before the new Constitution came into force. There is no indication that the petitioner requested for the charge sheet or witness statements and was denied. The petitioner could have as well raised this issue in his first appeal before the High Court. One of the petitioner's grounds of appeal before the High Court was that the charge sheet was based on wrongful information, therefore, the petitioner knew the charges he was facing. With regard to the issue of torture, I do note that while testifying in his defence, the petitioner informed the trial court that when they were arrested, the police started beating them. This issue is part of the record. The petitioner could have raised it before the three courts which dealt with his case. This is not anything new. Both the two Judge bench of the High Court and the three Judge bench of the Court of Appeal read the proceedings and noted the petitioner's allegations of having been beaten. That cannot be a reason to re-look at the record and the sentence.

I have gone through the record of the trial court. The record is quite clear, in all the occasions when the case was heard, an inspector of police conducted the prosecution. Initially inspector Lundanyo conducted the prosecution. Later on inspector Munyotu finalized the case. The police corporals only appeared during the mentioning of the case. I am satisfied that the prosecution was conducted by a qualified prosecutor. There was no prejudice to the petitioner.

The petitioner also contend that parts of the coram of the trial court are not complete. Reference has been made to page 7 of the record which indicate "*Coram as before*". The record show that PW1 and PW2 testified on 3rd December 2002. The prosecutor applied to have PW1 recalled so as to identify the robbed motor vehicle. The motor vehicle was outside the court. The application was allowed and the court moved outside to view the vehicle. Proceedings were conducted at the court yard. PW1 was recalled and identified the vehicle. Both accused were present and were allowed to cross-examine PW1 but had no question for him. The indication of "*Coram as before*" simply referred to the record prior to the change of venue. This cannot be held to be an incomplete coram. It can also not be a violation of the petitioner's constitutional rights.

Given the petition herein, I do find that the same is frivolous and made without any good grounds. There was no violation of the petitioner's constitutional rights. With regard to the death sentence, it is provided for under section 296 (2) of the Penal Code. Article 26 (3) of the Constitution also acknowledges that life can be deprived if provided for by the law. Section 24 of the Penal Code provides for the different kinds of punishment that can be inflicted by a court. Section 24 (a) provides for the death sentence. There is nothing unconstitutional in relation to the death sentence. It has not been outlawed.

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

Dated and delivered in Malindi this 27th day of July, 2016.

S.J. CHITEMBWE

JUDGE