



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 253 OF 2015

IN THE MATTER OF; ARTICLES 50(1) AND 51(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 50(6)
(b) OF THE CONSTITUTION OF KENYA**

BETWEEN

PETER MANSON OKEYO OUKO.....APPLICANT

AND

REPUBLICRESPONDENT

RULING ON PRELIMINARY OBJECTION.

Issues

i. Whether the doctrine of Resjudicata applies to constitutional petitions

ii. Whether this Petition is Resjudicata Petition No.347 of 2013- Peter Manson Okeyo Ouko v Republic

1. When this file was placed before me for considerations, I perused it and noted that on 16th June 2015, Honourable M. Ngugi J did record as follows:

“This court had already heard and determined petition (sic) by the petitioner raising similar issues as this. I therefore disqualify myself from hearing the matter. Let it be placed before Lenaola J as (sic) 19th June 2015 for directions.”

2. When the matter was placed before Honourable Lenaola J (as he then was) on 19th June 2015 the Honourable Judge (as he then was) made the following order:

“I am unable to hear this matter or reasons that I am well known to the petitioner. Let the matter be mentioned before Korir J for directions on 24th June 2015.”

3. On 24th June 2015 Honourable Korir J directed the petitioner to serve the Director of Public Prosecution with all the papers and ordered for mention on 30th June 2015 for further directions.

4. Throughout that period, the petitioner herein, Mr Peter Manson Okeyo Ouko was a *prose* litigant. However, on 18th April 2016 Mr Wilfred Nderitu advocate appeared for the petitioner and requested for 6 weeks to peruse the petitioner's file in court and for leave to file any amended petition or further affidavits or supplementary submissions. The Honourable Korir J directed as follows:

a. Director of Public Prosecution is admitted to the proceedings as an interested party.

b. Mr Nderitu is now on record as the advocate for the petitioner.

c. The amicus curie (Law Society of Kenya) to appoint a new advocate to represent it in this matter.

d. The Director of Public Prosecution to get in touch with the victims of the crime who will be at liberty to join the proceedings as interested parties.

e. The petitioner's counsel be at liberty to file and serve an amended petition, further affidavits and supplementary submissions within six weeks from today's date;

If the petitioner will not be filing any further documents, then what is already filed should be served upon Director of Public Prosecution within the said six weeks;

f. Upon service the Director of Public Prosecution will have 30 days to file and serve responses to the pleadings and submissions;

g. The Attorney General be at liberty to file and serve replies to any new pleadings or submissions by the petitioner. This should be done within 30 days from the date of service; and

h. Mention on 4th July 2016 to confirm compliance and fix a hearing date.

5. By 4th July 2016, Honourable Korir J had been transferred to Busia High Court where he now serves as the /presiding judge, and I was deployed to the Judicial Review Division hence this matter came before me for consideration.

6. On 4th July 2016, only the petitioner and his advocate Mr W. Nderitu were in court. I directed the Deputy Registrar to serve the Director of Public Prosecutions and the Honourable Attorney General to appear on 12th July 2016 at 9.000 a.m. for directions on how to proceed with the petition. By that latter date, Mr Nderitu had not filed any amendments to the petition. Neither had he filed any further submissions or affidavits on behalf of the petitioner, over six weeks after the orders were made on 18th April 2016 by Honourable Korir J.

7. On 12th July 2016 this court gave fresh directions on service of the petition and by 25th July 2016 when the matter came up for mention, Mr Karimi holding brief for Mr Nderitu informed the court that all parties had been served. I directed the parties to appear on 7th September 2016 for highlighting of the submissions at 10.00 am.

8. On 7th September 2016 Mr Nderitu raised the issue of the High Court and Court of Appeal records of the trial of the petitioner which had nonetheless escaped his attention. He also raised the issue of petition No. 347/2013 which this court had brought to his attention.

9. On the latter issue, Mr Ashimosi intimated that he wished to raise a preliminary objection that this

petition is Res judicata petition 347/2013 and the court with the agreement of all the parties present directed that the issue of this petition being or not being resjudicata petition 347 of 2013 be canvassed first on 17th October 2016.

10. This ruling, therefore determines the preliminary objection filed on 10th October 2016 by the Office of Director of Public Prosecutions to the effect that:

1. The issues raised in the Petition have been directly and substantially been determined by this court in Nairobi High Court Petition No 347 of 2013;

2. The matter in issue in the Petition have been heard on its merits and finally decided by this Honourable court in Nairobi HC Petition No. 347 of 2013.

3. This Petition/application is therefore Resjudicata.

11. The respondents therefore prayed that the petition be struck out in limine.

12. For record purposes, it is the court that brought to the attention of the parties' advocates the issue of Petition No 347/2013 appearing to be similar to this Petition. This was after perusing the proceedings in this Petition and noting that Honourable M. Ngugi J on 16th June 2015 disqualified herself from hearing the matter, for reasons that she had already heard and determined a petition by the petitioner raising similar issues to this.

13. I therefore found it appropriate to bring to the attention of the parties the matter which Honourable M. Ngugi J had concluded for the parties to peruse and address the court on whether this petition is in anyway resjudicata Petition No. 347 of 2013.

14. The parties advocates urged the preliminary objection orally before me, on 17th October 2016 with Mr Ashimosi urging the preliminary objection on behalf of the Director of Public Prosecution.

15. According to Mr Ashimosi, the issues raised in this Petition are directly and substantially as the issues raised in Petition No. 347/2013 which was heard and determined. Namely:

i. That this Petition is framed to be brought under Article 50(6) of the Constitution seeking for a new trial based on new and compelling evidence which meets the threshold under the Constitution;

ii. That Petition No. 347/2013 was brought under the same Article 50(6) of the Constitution and framed as an issue for determination by Honourable Mumbi Ngugi J and the decision at page 7 of the judgment at paragraph 35 delivered on 11th November 2014 is the same issue as the issue in this petition;

iii. Further, that at paragraph 44 page 10 of the said judgment, the learned judge deliberated on whether there was new and compelling evidence to warrant a new trial;

iv. That at page 14 paragraph 63 the learned judge made a finding that the petitioner had not made out a case for a new trial under Article 50(b) of the Constitution.

16. Mr Ashimosi submitted that the grounds for new and compelling evidence are substantially the same in both petitions, as what was raised in the earlier petition. He gave an example *being*:

i. "whether the court was influenced to make a predetermined decision based on correspondences between the parties;

ii. whether there was evidence suppressed by the appellate court;

iii. That the issue of perjury, obstruction and discovery of new evidence said to be compelling, were all raised in the earlier petition.

17. On whether Resjudicata doctrine applies to Constitutional Petitions as well, Mr Ashimosi relied on **Okiya Omtata Okiiti V Communications Authority of Kenya & 14 Others [2015] e KLR page 9** of the judgment dated 10th March 2015 wherein the court discussed that doctrine. Mr Ashimosi submitted that where parties merely repress issues which could have been raised in the previous case, the matter is resjudicata.

18. According to Mr Ashimosi, from the time when Petition No. 347/2013 was determined, no new matter or evidence has been raised hence this petition is incompetent and the same should be dismissed.

19. Mr Sekwe on behalf of the Attorney General submitted, associating himself with Mr Ashimosi's submissions and supporting the preliminary objection. He added that the petition herein and Petition 347/2013 are by the same Petitioner; that the petitioner in the earlier petition sought the same cause of action and that the orders being sought are the same. That the petitioner seeks for a new trial to be heard based on Article 50(6) of the Constitution based on new and compelling evidence. That it is the same evidence which was placed before M. Ngugi J which is the same evidence being relied on in this matter.

20. Mr Sekwe submitted that resjudicata bars subsequent proceedings determined conclusively by a court of concurrent jurisdiction. That there is a striking similarity in the two petitions and that nothing had changed since the determination of Petition 347/2013 to warrant the petitioner herein filing a new petition Under Article 50(6) of the Constitution.

21. That moreso, the new and compelling evidence is not highlighted.

22. Those parties are the same, the cause of action is the same and orders sought are the same. Counsel relied on **Civil Application No. 16/2012 by the Court of Appeal in Benjoh Amalgamated Ltd & Another Vs Kenya Commercial Bank Ltd [2014] e KLR at paragraph 53 page 17** where the Court of Appeal, citing the Singapore case in **Management Corporation Stratta Title Plan No. 301 V Lee Tat Development Pte Ltd [2009] S GHC 234** decided the principle of finality. He further relied on **Lilian Njeri Muraya Vs Virginia Nyambura ELC 127/2014** where the same principles were allegedly espoused.

23. According to Mr Sekwe, this petition is an abuse of the court process hence the court should dismiss it. In opposing the preliminary objection Mr Nderitu counsel for the petitioner submitted that a person can come before the same court under Article 50(6) of the Constitution as often as the occasion arises. That coming to court once does not per se bar him from coming back again. That the respondents had not provided the court with pleadings that were filed in Petition No. 347/2013 to enable the court to fully discern the issues in that Petition vis avis the issues in this petition. That all the respondents have done is gloss over the two petitions on the prayers and grounds being substantially the same.

24. According to Mr Nderitu, the earlier Petition related mainly to the issue of DNA testing while in this petition the issue is mainly correspondence between the office of the Attorney General and the prosecution which are totally two different issues.

25. Mr Nderitu submitted that from the preliminary objection as filed, there is no information on the face thereof that there is a challenge on facts of the previous petition. Further, that the question of what issues there are is a question in contention which cannot be resolved by way of a preliminary objection.

26. In his view, the preliminary objection herein is based on facts and not on a pure point of law, as was held in the **Mukisa Biscuit Manufacturing Company V West end Distributors**. It was further submitted that in the previous Petition No. 347 of 2013, the 1st respondent was not a party, which then disqualifies the argument that this litigation is between the same parties or that the same parties are

litigating under the same title.

27. Further, Mr Nderitu submitted that paragraph 31 of the sixth Schedule of the Constitution separates the office of the Attorney General from the Director of Public Prosecutions although historically the two appeared to be one, and that the two respondents cannot come into the matter under the same title.

28. In addition, it was submitted that Article 157 of the Constitution bars the Attorney General from representing the Government in the criminal proceedings. That in these proceedings which are criminal, the respondents have diverse roles to play in this petition.

29. In Mr Nderitu's view, although there was reference to Article 50(6) of the Constitution, the substantive operative Article in the previous petition was Article 35 of the Constitution relating to DNA evidence. That there is no such prayer in this petition. That the prayers in petition No. 347/2013 are totally different from the prayers in this petition and that there is totally nothing availed to this court to show that the issues raised in the current petition on new and compelling evidence were already available at the time the order in the earlier petition was made.

30. That the court is concerned with date of discovery of that new evidence and that at the hearing, the petitioner will show when the new and compelling evidence was made available and what efforts were made to get the new and compelling evidence. Accordingly, it was submitted on behalf of the petitioner that the cases referred to have little relevance to the specific circumstances of this case.

31. Mr Nderitu further urged the court to examine this matter from the perspective that the petitioner was a legally unaided person and that now he is being represented by a *probono* advocate and serving 18 years both pre and post conviction after his death sentence was commuted to life imprisonment.

32. That although there may be some issues which are repeated in both petitions, it would be a mockery of justice to dismiss the petition based on Resjudicata when the grounds for asking of the new trial are new.

33. Further, that the provision of Article 50(6) of the Constitution is to allow the person in similar circumstances seek justice, in appreciation of a previously failed system. That a window was being opened to consider the criminal justice system. He urged the court to dismiss the preliminary objection and allow the petition to be heard on its merits.

34. In a brief rejoinder, Mr Ashimosi submitted that the preliminary objection was not based on contested facts. He urged the court to examine the pleadings for the two petitions and discern the similarities.

Determination

35. I have carefully considered the 1st respondent's preliminary objection as supported by the 2nd respondent, I have also considered the parties' advocates submissions for and against the preliminary objection, and the case law cited.

36. The main issue for determination is whether this petition is resjudicata petition No. 347/2013; and if so whether Resjudicata can be taken as a preliminary objection is constitutional petition.

37. Commencing with the latter issue, the case of **Okiya Omtatah Okiiti V Communication Authority of Kenya & Others** (supra) is instructive. In that case, Lenaola J, referring to several authorities, including his own decision in **Okiya Omtatah Okiiti & Others vs Attorney General & 2 Others petition No. 593/2013** opined that :

“Whereas these principles of Resjudicata have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of resjudicata can and should only be invoked in constitutional matters

in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to re-determine an issue between the same parties and in the same subject matter. While, therefore, the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights based litigation and the reason is obvious.”

38. From the above opinion, though persuasive, I am in agreement with the learned Lenaola J (as he then was) in the above two decisions that resjudicata is applicable in constitutional matters but only in the clearest of cases.

39. In the instant case, the respondents contend that this petition is a replica of petition No. 347/2013 which was heard and determined by Honourable M. Ngugi J and therefore there is no new matter or compelling evidence that could not be produced at the time Petition No. 347/2013 was heard and determined.

40. On the other hand, the petitioner avers that the new and compelling evidence in this case is quite different from what was sought to be relied upon in Petition 247/2013 in that in the former petition, it related to DNA materials whereas in this petition, it relates to correspondence between the victim's relatives and the court and the prosecution which the petitioner believes may have greatly influenced the outcome of the criminal trial to his detriment.

41. Further, that in constitutional petitions, the court should be cautious in considering res judicata doctrine so as not to oust the petitioner who is serving a life sentence, from the seat of justice since what is sought to be challenged is new matters which were not within the knowledge and possession of the petitioner.

42. For this court to find that this petition is Resjudicata Petition No. 347/2013, it must be satisfied that clearly, the petitioner herein is relitigating the same matter before the same court over the same issues between the same parties and on the same subject matter.

43. I am in agreement with the decisions cited by the 1st respondent's counsel that In **ET V Attorney General [2012] e KLR** the court held that:

“ the courts must always be vigilant to guard against litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction.”

44. And in **Njangu V Wambugu & Another Nairobi HCC 2340/1991** where Kuloba J stated as follows regarding the importance of having a closure to litigation;

“ If parties were allowed to go on litigating forever the same issue with the same opponent before courts of competent jurisdiction merely because he gives his aces some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of resjudicata.”

45. Richard Kuloba in his book **“Judicial Hints on Civil Procedure 2nd Edition** scribes as follows:

“ the plea of resjudicata applies not only to points upon which the first court was actually required to adjudicate but to every point which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for resjudicata to apply: Law Ag V-P in Kamunye and others V Pioneer General Assurance Society Ltd [1971] EA 263, (20 October 1970) on appeal from the High Court of Uganda but relying in Jadra karsan V Haman Singh Bhogal [1953] 20 EACA 74 (10/3/1953), an appeal from the Supreme Court of Kenya, and has also been

followed by the Court of Appeal in Kenya, in the case of Hawkesworth Vs Attorney General [1974] EA 406 (7/10/1974)."

46. Indeed, as stated by Lenaola J in the ***Okiya Omtatah Okoiti*** (supra) case, it is not proper for parties to have piecemeal litigation, and a party ought to litigate in one suit all matters that belong to that subject in controversy.

47. In ***Popin (K) Ltd & 3 Others V Habib Bank Attorney General Zurich*** [1990] KLR 609, the court held that:

"but there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of resjudicata is the judgment of Wigram Vc In Henderson V Henderson [1843] Hare 00, 115, where the judge says:

Where given a matter becomes the subject of litigation, in and of an adjudicate by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of resjudicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

48. In the present petition, it is not in doubt that the petitioner is the same, against the Republic who is now represented by the Director of Public Prosecutions and the Attorney General, who occupy independent offices established under the provisions of Article 156 of the Constitution and Article 157 of the Constitution respectively.

49. The Director of Public Prosecutions is currently exclusively in charge of criminal prosecutions which was the function of the Attorney General prior to 24th August 2010 whereas the Attorney General is enjoined to these proceedings as the Principal Legal Advisor to the Government and having been responsible for all criminal prosecutions at the material time that the petitioner was arrested, arraigned in court and tried and convicted for the offence of murder. It therefore follows that the respondents can be considered as one party representing the Government of Kenya in criminal and legal matters against the Government.

50. In the Petition No. 347/2013, the petitioner brought the petition under Article 50(6) of the Constitution and so is this petition. However, the basis upon the new trial was sought in petition no. 347/2013 is not the same as this petition. In the earlier petition, the petitioner sought for the following principal orders:

1. That the following exhibits originally forwarded to the government chemist by Buruburu Police Station in connection with High Court criminal case No. 54/1999 for testing, namely, the multi coloured blood stained sweater of the deceased, the blood stained mucoid material retrieved from the vagina of the deceased, the torn white pant of the deceased, the blood of the deceased, the hair strand and the skin extracts from the blood stained finger nails be retested at both government chemist and as an independent forensic laboratory and the results so found be deposited with the court,

2. That the true certified copies of all the laboratory analysis notes written at the time of the testing of the exhibits forwarded by Buruburu Police station to the government analyst regarding High Court criminal case No. 54 of 1999 be provided to me. The petitioner and to

the court for review of the same;

That true certified copies of the documentation generated at the time of the analysis by Mr J.K. Mungai, the government chemist, including true certified copies of the test paper strips of the DNA (PW/HLD Q A1) analysis alleged to have been used in the tests be provided to me, the petitioner;

4. That certified copies of all the post mortem examination photos taken at the City Mortuary on 23rd December 1998 in the case of Jennifer Wangari Macharia(deceased), be provide to me the petitioner.

5. That certified copies of all the scene of crime photos ref. No.CIS/NA/SOC/VOL 6/47/99 dated 26th March 1999 and taken on 19th December 1998 in the case of Jennifer Wangari Macharia (deceased), be provided to me the Petitioner.”

51. The above prayers are contained in the supplementary notice of motion in the above petition , the Learned Judge M. Ngugi J noted that prayer 1 of the petition dated 23rd July 2013 seeks orders that he be *granted “ a conservatory order to be subjected to forensic DNA testing by both the government chemist as well as an independent forensic laboratory.”*

52. In the humble petition of the petitioner herein, the facts upon which the new trial under Article 50(6) of the Constitution is sought are, principally, *inter alia:*

6. that new and very compelling evidence has emerged in the form of proof that vested and interest (sic) parties had running communication with judicial officers, including then serving Chief Justice and sought to and sought to and possibly succeeded in influencing them to make a pre- determined decision.

7. That new and compelling evidence has emerged in the form of communication between a particular vested interest (who happens to be the husband of a key prosecution witness) and a judicial officer at the time of my trial proving that there was collusion between the police officers handling the case and vested interests to frame me for the offence. The letter is an exact replica of portions of the investigating officer’s statement and evidence in court and I was never made aware of its existence at trial or at appeal. This is not something which an ordinary citizen without control of the entire pre- trial process could have come across and authontatively quoted from.

8. That new and compelling evidence has emerged in the form of correspondence between the office of the then Attorney General and the police proving that pertinent evidence in the form of statements from possible key suspects in the murder (who happened to be on duty at the very spot where the deceased met her death) was deliberately suppressed by the prosecution.

9. That new and compelling evidence has emerged showing the possibility of the existence of two different decisions reached by the Court of Appeal in my matter and which go in buttressing the possibility of outside interference in the matter as alluded above.

10. That is it only fair and just that my prayer for a new trial be granted in the wider interest of justice and in accordance with the law.

53. Whereas this court, from a perusal of the entire petition herein and petition 347/2013 agrees that the subject matter giving rise to the trial and conviction and sentencing to death of the petitioner is the same in both petitions as it concerns his conviction for the murder of his wife Jennifer Wangari Macharia vide Nairobi HC criminal case No. 54/1999; and that the petitioner’s appeal to the Court of Appeal vide CA 78/2002 was dismissed; and that following that dismissal of his criminal appeal he remained a condemned convict awaiting his execution until 2009 when the President commuted death

sentence imposed on the petitioner with life sentence and finally, as this court writes this ruling, is well aware that on 20th October 2016 the petitioner was released from life in prison at the President's pleasure and is now a free person; I do not agree that this petition is *resjudicata* petition No. 347/2013.

54. The reason is a simple one that the facts relating to the new and compelling evidence that is sought to be adduced are substantially different from the facts in the petition 347/2013.

55. As correctly submitted by Mr Nderitu counsel for the petitioner, in the earlier petition, the facts related to DNA evidence whereas in this matter, the facts relate to several correspondence and writings which are contained in the petitioner's supplementary affidavit bundle filed in court on 21st July 2015.

56. As to whether that evidence is new and or compelling or reliable or substantial or appears to be highly probative of the case against the petitioner convict is not for determination at this stage, but for consideration at the substantive hearing of the petition.

57. In my humble view, this petition being a constitutional petition would only be Resjudicata petition No. 347/2013 if there was evidence that at the time of the hearing of petition 347/2013, the petitioner had in his possession or that he was in a position to access the alleged new and compelling evidence relating to correspondence between key parties to the criminal case including the Chief Justice, the Chief Magistrate and the Attorney General among others.

58. This court is conscious of the fact that a person on death row or one serving life sentence is an anxious person. He is not a free person capable of, on his own accord, to access information such as the one which is the subject of this petition, since that information was not part of or contained in the committal bundles and neither was it relied upon by the prosecution or the defence at the time of the trial.

59. The respondents have also not demonstrated that the petitioner was capable of accessing or possessing the allegedly new and compelling evidence. There is also no evidence that the petitioner had the evidence in question but withheld it so as to come before this court in piecemeal.

60. In other words, this is not one of those clear cases where this court would find that a resjudicata case has been made out and it would therefore be a travesty of justice to oust the petitioner from his quest to benefit from the new dawn exemplified in Article 50(6) of the Constitution and possibly prove the prosecution wrong on its evidence that nearly send him to the gallows, thanks to the merciful hand of the President granted by the same Constitution.

61. Off course, this court cannot fail to empathize with the family of the deceased Jennifer Wangari Macharia who lost their beloved daughter and to her children who lost their beloved mother in the hands of cruel people.

62. On the basis of the above analysis, I am not satisfied that the preliminary objection based on the doctrine of resjudicata was well taken. The same is dismissed with no orders as to costs.

63. To bring this matter to a closure, the petitioner is now directed to forthwith and without any delay set down his petition for hearing and determination by the court on its merits.

64. Hearing of the petition shall be on 28th February, 2017 by consent. The Petitioner to serve the Attorney General with Notice of hearing.

Dated, signed and delivered in open court at Nairobi this 16th day of November 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Wilfred Nderitu for the Petitioner

Mr Spira h/b for Mr Ashimosi for the Respondents

CA: Adline