



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION NO 1 OF 2013

IN THE MATTER OF: ARTICLE 50(6) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: CONSTITUTIONAL PETITION BY MOHAMED IDDI
OMAR**

BETWEEN

MOHAMMED IDD OMARPETITIONER

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The Petition dated 23rd May, 2013 seeks an order to the effect that the judgment in Malindi Criminal Case Number 12 of 2006 be set aside and a matter submitted for re-trial. The Petition is supported by the Petitioner's affidavit sworn on 23rd May, 2013.

The main basis of the application as per the submissions of Mr. Otara, the Petitioner's advocate is that the Petitioner was sentenced to suffer death. He was charged with the offence of murder in Malindi Criminal Case Number 12 of 2006. He was convicted and sentenced to death. He filed Criminal Appeal Number 14 of 2010 before the Court of Appeal but it was dismissed.

The Petition is premised on the provisions of Article 50(b) of the Constitution. The Petitioner had lucid and illucid mental status and was not subjected to medical test. During the hearing of the case his advocate did not visit him so as to inquire about his mental status. Upon conviction, the prison department took the Petitioner to a psychiatrist. A letter dated 6th February, 2013 by Dr. Mwang'ombe indicates that the Appellant has been on drugs since 2010. The Petitioner is now fit to testify and was not able to call his witnesses.

Counsel for the Petitioner maintains that the Petitioner was not in a good state of mind capable of enabling him to defend himself. Counsel is also relying on the affidavit of Rehema Iddi Omar sworn on 23rd March, 2013. The affidavit is to the effect that the Petitioner used to have mental problems.

Mr. Nyongesa and Mr. Monda, Counsels for the State, opposed the petition. Counsel submitted that there is no new compelling evidence. The Petitioner offered an *alibi* defence and did not incriminate himself. Rehema Iddi was a prosecution witness and never told the court about the Petitioner's mental status. It never arose during the hearing that the Petitioner was insane. Further, Dr. Mwang'ombes letter does not

give the mental status of the Petitioner as of 2006. The proposed witnesses are also not named or their statements attached. The defence counsel told the court that the Petitioner was giving unsworn evidence and had no witness to call.

The Petition herein is brought under Article 50(6) of the Constitution. Article 50(6) states as follows:

“6. A person who is convicted of a criminal offence may petition the High Court for a new trial if -

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal;

and

(b) new and compelling evidence has become available.”

The Petitioner herein filed appeal number 14 of 2010 before the Court of Appeal. The main reason for the Petition is that the Petitioner was not of good mental status and is now fit to stand trial. This is supposed to be new and compelling evidence. The Petitioner contends that due to his previous mental status, he incriminated himself and did not call his witnesses.

I have read the petition, the Petitioner's supporting affidavit, the affidavit of Rehema Iddi Omar and the replying affidavit of Duncan Nyongesa sworn on 31st July, 2014. The most crucial issue in an application of this nature is whether new and compelling evidence that was not available during the trial has now become available.

The letter by Dr. Mwang'ombe is dated 6th February, 2013. It indicates that the doctor interviewed the Petitioner on 6th February, 2013 and is fit to plead. The doctor indicates that the interview was conducted in the presence of Corporal Ibrahim Mjomba and Pc. Nixon Bwire who informed the doctor that the Petitioner was of normal behavior while in police custody. Indeed the doctor refers to the Petitioner as an **accused**.

Dr. Mwang'ombe also indicated that the Petitioner had been on anti-psychotic medication and seditious since June, 2010. Given that information, it is clear to me that the Petitioner was taken to the doctor as an accused person. There is no evidence that in 2006 the Petitioner was on medication. The evidence before the trial court shows that the Petitioner was living with the deceased as his wife. Rehema Iddi Omar testified that the the Petitioner is her brother. She never stated that the Petitioner had mental problems. The witnesses who were neighbours of the Petitioner testified to the effect that the Petitioner used to frequently quarrel with his wife. I have read the detailed evidence given by the Petitioner during the hearing, this was an alibi defence and it is clear that the Petitioner was aware of his trial.

The hearing of the case took about three years. From 2006 to 2008. By that time the Petitioner was in remand. There was no single report to the effect that the Petitioner had mental problems.

Although Article 50(6) of the Constitution was included in the Constitution with the intention of assisting people who had been wrongly convicted, there is a great danger of it being abused. This is one case where an attempt is being made to abuse the Article and the entire court process. There is no treatment notes or medical prescription provided by the Petitioner about his mental status. An appeal was heard before the Court of Appeal and the issue of mental status did not arise. The Application is simply an afterthought. There is no new and compelling evidence.

According to Dr. Mwang'ombe, the Petitioner was from police custody yet he was supposed to be serving sentence in prison. This is a simple ploy aimed at duping the court into believing that the Petitioner used to suffer mental illness. That has not been proved.

I do find that the Petition lacks merit and is hereby dismissed. The Petitioner to continue serving his sentence.

Delivered and dated on this **25th** day of **February, 2015**.

Said J. Chitembwe

JUDGE