



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 79 OF 2013

PAUL KOSGEI KIBET.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. On 14th April 2011, the petitioner was convicted by the High Court for murder. He was sentenced to suffer death. His final appeal to the Court of Appeal was dismissed on 11th November 2011. Initially, the petitioner filed a “*petition of appeal*”. That was on 29th July 2013. In that petition he was praying for a new trial. On 13th May 2014, he was granted leave to amend the petition. He lodged an *amended petition* on 28th May 2014. He now claims that his rights enshrined in articles 19, 20, 21, 22, 23, 27 and 48 of the Constitution were *violated*. He prays that his conviction and sentence be quashed. In the alternative, he prays for a retrial.

2. The amended petition raises six grounds. First, that the prosecution did not prove the petitioner had malice aforethought; secondly, that the motive was not proved; thirdly, that the requirements of section 200 (3) of the Criminal Procedure Code were not complied with; fourthly, that the petitioner was not granted an opportunity to mitigate the sentence; and fifthly, that the delay in concluding his trial violated sections 72 and 77 of the repealed Constitution; and finally, that the entire trial was unfair, biased and a farce.

3. The petitioner relied on detailed submissions filed on 14th May 2015. The application is contested by the Republic. It is contended that the matters raised by the petitioner were conclusively settled by the trial court and the Court of Appeal. They include the issues of veracity of the evidence in the trial court; criminal procedure and degree of proof; the requirement for mitigation; and, the fairness of the trial or the alleged violation of the petitioner’s constitutional rights. Regarding the delays in the trial, the State blamed the petitioner for being at large; and which compelled the court to issue a warrant for his arrest. I was urged to find that the High Court is now *functus officio*. It was submitted that there is no basis to order a fresh trial or to grant any other relief.

4. I have considered the *amended* petition and rival submissions. It is instructive that the petitioner at first presented a *notice of motion* praying for a *new trial*. By his own admission, he could not marshal new and compelling evidence as required by article 50 (6) of the Constitution. He thus amended the petition to seek reliefs under articles 19, 20, 21, 22, 23, 27 and 48 of the Constitution. There is no deposition before

me showing that new or compelling evidence has become available. *Ipsa facto* the petition cannot lie under article 50 (6) of the Constitution.

5. Initially, the State charged the petitioner in the lower court for manslaughter. Plea was taken on 6th September 2007. The petitioner was released on bond. The State later brought fresh information to the High Court for murder. The petitioner failed to attend the High Court. A warrant of arrest was issued. The fresh plea for murder was not taken until 4th October 2007. I agree with the prosecution that the petitioner *contributed* to the delay. Further delays were triggered by the death of the trial judge and the transfer of the succeeding judge. There is no evidence before me demonstrating the violation of section 72 or 77 of the repealed Constitution. Furthermore the remedy for violation of section 72 of the repealed Constitution is *not* an acquittal: it lies in an action for damages.

6. The trial at the High Court commenced before Kaburu Bauni J who heard three witnesses. Sadly, he passed on. The trial was taken over by M. Ibrahim J (as he then was). I have looked at the record. Directions in compliance with section 200 (3) of the Criminal Procedure Code were taken on 25th May 2008. It was ordered that the trial proceed from where it had reached. Mwilu J (as she then was) heard all the remaining prosecution witnesses. She ruled that the petitioner had a *case to answer*. The latter judge then went on transfer. It is at that point that Karanja J took over the proceedings. The case for the prosecution having closed, and a ruling on a case to answer having been made, I find that there was full compliance with section 200 of the Act. But even if I be wrong, it is a matter the petitioner could have taken on appeal to the Court of Appeal. I have seen the memorandum of appeal. That matter was never raised.

7. The petitioner was convicted and sentenced to suffer death. He was tried by a competent court. The petitioner was aggrieved by the findings. The Court of Appeal agreed with the findings of the High Court. The trial judge did not take the mitigation from the petitioner. Regarding that failure, the Court of Appeal admonished the court that it is a good practice to take mitigation even where the law provides for a mandatory death sentence. See *Elphas Fwamba Toili v Republic*, Court of Appeal, Criminal Appeal 305 of 2008 (unreported). In the end, the Court of Appeal *dismissed* the entire appeal. It is not possible to reopen the matter now.

8. The petitioner contends that malice aforethought and the motive for murder were not proved beyond reasonable doubt. Both the High Court and Court of Appeal were *satisfied* that the petitioner, *of malice aforethought*, killed the deceased. It is *not* mandatory for the prosecution to prove motive for the offence of murder.

9. The petition is thus a disguised appeal. The petitioner is not entitled to a further bite at the cherry. The new Constitution is not an avenue to non-existent appeal. See *Mohamed Abdulrahman Said and another v Republic*, Mombasa, High Court Misc. Criminal Appl. 66A & 66B of 2011 [2012] eKLR, *Rodgers Ondiek Nyakundi v State* Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR, *John Kipkeu Kiprotich v Republic* Eldoret, High Court Misc. Criminal App. 97 of 2011 [2015] eKLR.

10. The petitioner is asking this Court to reopen the matter, reconsider the findings of the two superior courts, and grant some reliefs to the petitioner under articles 19, 20, 21, 22, 23, 27 and 48 of the Constitution. I am unable to hold on the materials before me that the trial at the High Court was spiteful, partial or a farce. There is no clear basis for a finding that the petitioner was denied a fair trial; or, that the court violated his dignity; or, that he was not afforded equal treatment and protection of the law; or, that he was discriminated. The guilt of the petitioner was *re-affirmed* by the Court of Appeal. I have no *jurisdiction* to reopen the matter. True, this Court has original jurisdiction and power to determine petitions claiming violation of rights or fundamental freedoms. But that is not the real picture in this case: there is no evidence that *any* of the fundamental rights of the petitioner were violated.

11. As I have stated, there is no *new and compelling* evidence. The petition cannot lie under article 50 (6) of the Constitution. The matters raised in the amended petition were dealt with conclusively by the High Court and Court of Appeal. I have no reason to acquit the petitioner or to grant him any further relief. When I interrogate the entire petition closely, it is simply a *disguised* appeal couched in *constitutional*

language. I believe there must be an end to litigation.

12. The upshot is that the entire petition is devoid of merit. It is hereby dismissed. In the interests of justice, I will make no orders on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The petitioner (in person).

Ms. R. N. Karanja for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. J. Kemboi, Court clerk.