REPUBLIC OF KENYA

INTHE HIGH COURT OF KENYA AT KISUMU

PETITION (CRIMINAL) NO.8 OF 2014

RICHARD OLOO OTIENO..... .....1ST PETITIONER

JARED OCHIENG JURA ….....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (NYANZA).....RESPONDENT

J U D G M E N T

Both the petitioners herein were charged with the Offence of Robbery with violence and sentenced to death. Their appeal to the High Court and the Court of Appeal were unsuccessful. They have then filed this petition under the provisions of Article 50(6) of the Constitution arguing inter-alia that there are new and compelling evidence which if considered shall be entitled to an order of retrial.

RICHARD OLOO OTIENO the 1st petitioner seemed not to contest the sentencing. His grounds are basically on mitigation and he prays that due to the reform he has undergone while in prison he seeks this courts intervention. He argues that he has learnt several trades while in prison and in particular welding, masonry and production of various eatable food items. He has also undergone biblical studies and he is a completely changed man. He pleads that he left behind 2 wives who have since died and the children are staying alone.

The 2nd petitioner **JARED OCHIENG JURA** on the other hand has raised 3 issues basically which he considers them to be new and compelling evidence. The first one is that prosecution failed to call essential witnesses namely the arresting officer, investigation officer and the medical doctor.

Secondly that there were 2 charge sheets which caused the court not to be sure of which one to be believed.

Thirdly that he was denied the services of a lawyer which was contrary to Article 50(2) of the Constitution.

The state opposed the petition arguing basically that there was no new and compelling evidence and that all the issues raised by the petitioners were dealt with by the three courts. The learned state counsel argued that the issue of death penalty is still in our penal laws and the constitution and this cannot be a new issue altogether.

We have heard the petition, perused the proceedings from the Lower Court all the way to the Court of Appeal. This court is not supposed to sit as an appellate court when considering such petition as the appellate court did render its verdict way back.

In considering whether there are new and compelling evidence as suggested by the petitioners, the same ought to be **"such evidence that could not have been obtained with reasonable diligence for use during trial; It would probably have an important influence on the result of the case, though it need not be decisive; it must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."**

See **MZEE WANJIE & 93 OTHERS VRS A. K. SAKWA & 3 OTHERS (1982-88) 1 KAR at 465, 466.**

The issues raised by the 1st petitioner on mitigation cannot be termed as new and compelling evidence.

From the records of the proceedings its clear that he was granted room to mitigate and consequently we do not find the same new. They are however moral issues which would be raised in another forum and not this petition.

The three issues raised by the 2nd petitioner are worth considering. The first issue raised was the failure by the prosecution to call the arresting officer, the investigating officer and the doctor. We have perused the High Court's proceedings and we think the issue was adequately dealt with by the learned judges when they stated thus:

"we are not convinced in light of the above that the absence of the arresting officer and or investigating officer lowered the prosecution case since their role would have had more to do with filling in technical gaps which in our view would not have added much to the evidence of those present at the scene. The magistrate was right in our view to find that no prejudice was likely to ensue from the omission."

On the issue of 2 charge sheets, we do not find this argument plausible as the same would or ought to have been raised in the three courts. This is not a new issue at all.

The petitioner argued that he lacked the service of a lawyer which was a breach of his fundamental rights. Whereas this could be true though not entirely as he was represented in the Court of Appeal, as it stands now our procedures requires the state to provide a counsel only in murder cases but not other offences. There was no reason advanced by the petitioner as to why he was unable on his own to obtain the service of a counsel. Neither is there any evidence to suggest that he requested for one and was denied.

The issue regarding death penalty being unconstitutional was well settled in the case of **JOSEPH MWAURA AND 2 OTHERS VRS REPUBLIC**.

CIVIL APPEAL NO.5/2008 (NBI) where the 5 learned judges held that so long as the death penalty is still in our statutes the courts hands are tied and therefore there is no option but to uphold it. They however threw the challenge to the Parliament to amend it if they find it unconstitutional

We think we have said enough to suggest that there is no new and compelling evidence to warrant an order of retrial in this matter. The same is dismissed.

Dated, signed and delivered this 29th day of September, 2015

H. K. CHEMITEI **E. N. MAINA**

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