REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 14 OF 2012

TIMOTHY KARUIBU NGUGI ….....PETITIONER

VERSUS

REPUBLIC ….....RESPONDENT

J U D G M E N T

1. The Petitioner has approached this Court under Articles 50(2)(p) and Article 23(1) and (3) of the Constitution challenging the constitutional validity of the mandatory death sentence meted out to him and subsequently commuted to life sentence. He prays that this court be pleased to declare the mandatory death sentence as unconstitutional for infringing on his right to life. The Petitioner also prays that in the alternative that this Court do make an order of review of his case as new and compelling evidence has become available to him.

2. The petitioner's trial began at the Chief Magistrate's Court at Nakuru in CRIMINAL CASE NO. 1799 of 2004 where he together with others were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, convicted and sentenced to suffer death. Being dissatisfied with the Judgment of the trial Court, the petitioner filed an appeal in the High Court at Nakuru vide HC CRIMINAL APPEAL NO. 126 OF 2006. The appeal was dismissed and conviction upheld. Being further dissatisfied, he lodged a second appeal at the Court of Appeal sitting at Nakuru in CA CRIMINAL APPEAL NO. 95 OF 2007. Again the Court of Appeal agreed with both the High Court and the Trial Magistrate's Court and upheld the conviction as well as the sentence.

Summary of the Case

3. The petitioner has premised his quest for review on several grounds contained in the Amended petition and his supporting affidavit sworn on 6th November 2014 . In brief they include:

1. That section 296(2) provides for mandatory death sentence which fetters the trial court from exercising its constitutional discretions under sections 324 and 329 of the Criminal Procedure code.
2. That the ingredients of robbery with violence prescribed under penal code were not proved against him.
3. That he has been arbitrarily deprived of his right to life guaranteed under Section 26(1) and (3) of the Constitution.
4. That he was not accorded a fair hearing as is envisaged in Article 50 of the constitution
5. That the charge sheet was fatally defective as the offence for which he was charged was not specifically defined.

SUBMISSIONS

4. The Petitioner filed written submissions. He began by challenging the charge sheet. It was argued that in charging the petitioner with the offence of robbery with violence the prosecution perpetrated a miscarriage of justice as the petitioner was a victim of the robbery and therefore the ingredients of the offence cannot be fastened upon him.

5. He argued that the prosecution perpetrated a further miscarriage of justice by invoking sections 10, 20 and 21 of the Penal Code to tie him the crime whereas he was just a victim and not a conspirator. Finally that, there is new and compelling evidence in the form of police OB reports and testimony of PW2 at trial that has become available to him and he wishes to present the same to court.

The State did not file a reply to the petition neither did they file submissions.

COURT'S RENDITION

6. The petition herein raises three major issues namely:

1. Whether the mandatory death penalty upon conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code is unconstitutional for being inconsistent with Article 26 of the Constitutional and Sections 324 and 329 of the CPC.
2. Whether the petitioner has established a case for a re-trial under Article 50(6) of the Constitution.
3. Whether the petitioner is entitled to the remedies sought.

Constitutionality of the mandatory death sentence

7. It is the view of the petitioner that the death penalty is an unconstitutional form of punishment as it is contrary to Article 26 of the Constitution which guarantees the right to life.

8. However a reading of the Article reveals that Article 26(3) recognises that a person can be deprived of his life intentionally if the deprivation is to the extent authorised by the constitution or other written law. The situations in which a person's right to life may be curtailed are contained in the penal code. Section 24 thereof provides that the punishments which may be inflicted by a court include death sentence. This is an exception to the enjoyment of the right to life. To that extent therefore, death penalty is constitutional. This position was emphasised by the court of appeal in ***JOSEPH NJUGUNA MWAURA & 2 OTHERS VS.-R CRIMINAL APPEAL NO. 5 OF 2008***

"Death as a penalty has been sanctioned by the Constitution. We believe that as the Court before us in Godfrey Mutiso v R correctly held: 'the death penalty remains a lawful sentence in Kenya and appears set to remain so for a long time to come.'

To suggest that the Articles of the Constitution outlaw the death penalty is, with respect, a great danger to the people of Kenya and that is a remarkable departure from the tenets of constitutional interpretation. We think we have said enough to show that the death penalty is, contrary to the appellants' arguments, grounded in the Constitution."

9. The petitioner also argues that the mandatory death sentence fetters the court from exercising its discretion to determine the appropriateness of the sentence meted out and application of Sections 324 and 329 of the Criminal Procedure Code.

10. The court of appeal in ***JOSEPH NJUGUNA MWAURA*** was however of a different view. It concluded in that regard that declaring the mandatory death as unconstitutional would amount to usurping the mandate of Parliament and reviewing the decision of the people of Kenya, made during the referendum. It stated as follows:

> " ***In our understanding, courts have no jurisdiction in matters over which other arms of***

government have been vested with jurisdiction to act. Even under the new Constitutional dispensation, this court cannot properly or legitimately review the decisions of the people of Kenya, made during the referendum, or those of the legislation when those decisions are lawful. To say otherwise would be to act in complete contravention of the Constitution.

As judges,our mandate is fidelity to the Constitution and to the law. we cannot interpret the Constitution and other statutes whimsically where no discretion or window has been provided. The right to life under Article 26 of the Constitution of Kenya, 2010 has been fashioned in a specific manner to provide, or include, specific circumstances where life is limited, that is, to the extent as provided by law.

In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do."

11. As a consequence the petitioner's ground on the unconstitutionality of the mandatory death sentence must fail.

A case for a New Trial?

12. In the alternative prayers, the petitioner prays that his case be reviewed as new and compelling evidence has become available to him in the form of Police OB reports and the evidence of PW1 during trial.

13. The petitioner has used the term "review" we but I think the right term is a "new trial". A person who has been convicted and has exhausted all the appeals has the right, under **Article 50 (6)** of the Constitution to seek a fresh trial by demonstrating that there is new and compelling evidence.

14. The Supreme Court of Kenya in **TOM MARTINS KIBISU VS.- REPUBLIC [2014] eKLR** has eloquently defined new and compelling evidence in the following terms:

> ***" We are in agreement with the Court of Appeal that under Article 50(6) "new evidence" means " evidence which was not available at the time and which, despite exercise of due diligence, could not have been availed at trial" and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict". A court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against the accused person."***

15. The petitioner has stated the evidence that has become available to him is Police OB reports and the evidence of PW1 during trial. Can this be classified as new and compelling evidence? A reading of the trial court record divulges that these OB reports were available to the court at the time of trial yet they did not influence the court's decision. We also do not see what probative value the evidence of PW1 will have now that it did not have during trial. The Supreme Court in ***TOM MARTINS KIBISU VS.- REPUBLIC (SUPRA)*** has stated that compelling evidence must be of probative value, capable of belief and which if adduced at trial could have led to a different verdict. It must also be remembered as was stated in the case of W***ILSON THIRIMBA MWANGI VS. DPP MISC. APPL. NO. 271 OF 2011*** That the petitioner is not coming before this court with a pressumption of innonce but that of guilt, his guilty having been ruled by two superior courts. The onus is thus upon him to convince this Court that the evidence he is introducing is of probative value. We find that the evidence is merely cumulative and corroborative of the petitioner's evidence in defence. It does not introduce new information that is not already in the Court's knowledge and which would persuade it to hold that the two superior courts erred in their decision.

16. Finally, the petitioner also raised the issue of a defective charge sheet. It was his argument that the charge sheet read to him was defective. It ought to be remembered that this is a constitutional court and not an appellate court. It cannot therefore cloth itself in an appellate garb and decide issues that were or ought to have been dealt with during trial or on appeal. To do so would amount to allowing the petitioner two parallel and collateral remedies with respect to the same matter, namely a direct appeal and an application under Article 50(6), which could lead to conflicting decisions. See. ***CHOKOLINGO VS.- ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1981] 1ALL ER 244.***

We think we have said enough to suggest that the petition is unmeritorious We therefore dimiss the same with no orders as to costs.

Dated, signed and delivered this 28th September, 2015

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

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