



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

**COURT OF APP. NO.74 AND 75 OF 2010. CONSOLIDATED WITH HC APPL. NO.78 AND 80
OF 2007**

IN RESPECT OF CRIMINAL CASE NO.2280/2003 OF THE (PM'S) COURT AT MALINDI

CONSTITUTIONAL PETITION NO. 4 OF 2015

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT
PRACTICE AND PROCEDURE RULE 2013**

AND

**IN THE MATTER OF ARTICLES 20 (1) (4), 21 (1) (4), 22 (1) (3) (C) OF NEW CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF
THE INDIVIDUAL UNDER ARTICLE 25 (A) (B) AND ©, 26 (1), 27 (1) (2) AND (4), 28, 29(A) ©
(D) AND (F), 35 (1), 48, 50 (1) (2) (K) (P) (Q) (6) (A) AND (B) AND ARTICLE 23 (1) (3) OF THE
CONSTITUTION**

AND

**IN THE MATTER OF ARTICLES 258 (1) AND 259 (1) (3) (A) OF THE GENERAL
PROVISIONS OF THE NEW CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 214 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

MICHAEL WAFULA WAMBANI.....1ST PETITIONER

AND

JOSEPHAT MUSYIMI MAKAU.....2ND PETITIONER

VRS

THE DIRECTOR OF PUBLIC PROSECUTION...RESPONDENT

RULING

The applicants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They were convicted and sentenced to suffer death. They filed Criminal Appeal Numbers 78, 79 and 80 of 2007 before the Malindi High Court. The consolidated appeals were dismissed on 17th March 2010. The applicants proceeded to the Court of Appeal and filed Criminal numbers 73, 74 and 75 of 2010. On 26/2/2015 the Court of Appeal disallowed the appeals.

The current application is based on Articles 20, 21, 22, 25 and 50 of the Constitution as well as section 214 of the Criminal Procedure Act. The main issues raised is that during the course of the hearing before the trial magistrate, the prosecution amended the charge sheet after some witnesses had testified. However, the applicants were not asked to have the witnesses recalled. Their advocate opposed the application for amendment but the trial court allowed it under section 214 of the Criminal Procedure Act. The prosecution introduced two items namely a knife and an alarm. The process led to violation of the applicant's Constitutional rights as four witnesses had already testified.

Secondly, the applicants contend that the case before the trial court was heard by two magistrates. The first magistrate heard three witnesses while the second one heard four witnesses. Section 200 of the Criminal Procedure Code was not complied with when the second magistrate took over the case. The two superior courts did not deal with this issue. The applicants rely on the Case of **Samuel Ngare v Republic, Malindi Criminal appeal (C.A) No.5 of 2011**. The applicants also rely on the Case of **Harrison Mirungu Njuguna v Republic (C. A) No.90 of 2004**, and the Case of **Amos Karuga Karatu v Republic, Nyeri High Court Criminal Case number 12 of 2006**. The applicants also contend that they were not allowed to mitigate.

Mr. Nyongesa, prosecuting counsel opposed the application. Counsel submitted that there is no new and compelling evidence that has been brought out by the petitioner. All what is being raised was dealt with during the hearing of the appeals. Further, the petitioners seek a retrial but Article 50 of the Constitution provides for a re-trial. The only amendment that was introduced was the addition of recovered items namely an alarm and keys. There were other items in the charge sheet such as a motor bike. The petitioners were given an opportunity to mitigate but opted to keep quite. With regard to the provisions of section 200 of the Criminal Procedure Act, the issue was dealt with by the Superior Court.

The main issue for determination is whether the petitioners' Constitutional rights were violated. The petitioners did undergo a full trial before the trial court. Their appeals to the High Court were disallowed. Regarding the amendment of the charge sheet, it is true that the prosecution amended the charge sheet after four witnesses had testified. Those witnesses were not recalled. The amendment involved the inclusion of some of the recovered items namely a knife and an alarm. The addition of these two items did not alter the value of the stolen items. The other items indicated in the charge sheet were a motor cycle Suzuki registration number KAL 771 M.

The main issue of concern is whether the petitioners were prejudiced by the inclusion of these two items. The record of the trial court was availed to the petitioners and they could have raised that issue as one of their grounds of appeal. There was no prejudice to the petitioners. Even if the two items were not included, there was the motor cycle which formed part of the stolen items. The conviction was not based on the two added items. I do find that this ground of the petitions does not assist the petitioners.

The next issue of the contention that two magistrates heard the case before the trial court. This is true as per the record. The non-compliance with section 200 of the Criminal Procedure Act does not lead to automatic nullification of the proceedings of the trial court or outright acquittal of the accused persons. The non compliance of section 200 of the Criminal Procedure Code must have caused prejudice on the accused. Once again, I do find that the record of the trial court was available to the petitioners and they could have raised this issue with the Superior Courts. This is not a finding of new and compelling evidence. The allegations are part of the record and cannot change the status of the proceedings before

the three courts.

The petitioners submit that their Constitutional rights under Articles 20,21, 22 and 25 were violated. The trial was fair and the petitioners were represented by an advocate before the trial court. Further, violation of one's rights cannot be a ground for acquittal.

It is clear to me that the petitioners were accorded all their rights in relation to their prosecution before the trial court. Their appeals were equally heard and determined. There was no violation of their rights. The petition herein lacks merit. It was filed only one month after the Court of Appeal had delivered its judgment on the petitioner's appeals on 26/2/2015. This is an abuse of the court process.

The upshot is that the petition herein lacks merit and is hereby dismissed.

Dated, signed and delivered at Malindi this 22nd day of October, 2015.

SAID J. CHITEMBWE

JUDGE