REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CONSTITUTIONAL PETITION NO. 5 OF 2014

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

AND

IN THE MATTER OF ARTICLE 20 (1) (4), 21 (1), 4 , 22(1), 3(c) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL UNDER ARTICLE 25(a) AND (c) 26(1), (3), 27(1), (2) and (4), 28, 29 (a) (c) (d) and (f) 48, 50, 6(b) AND ARTICLES 23(1), (3)

AND

IN THE MATTER OF ARTICLE 258(1) AND 259(1), 3(a) OF THE GENERAL PROVISION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NEW AND COMPELLING EVIDENCE IN LINE WITH ARTICLE 50, 6(b)

BETWEEN

S J alias S.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Following an Appeal to the Court of Appeal at Kisumu in Criminal Appeal No. 622 of 2010 S J Alias S vs Republic the Death sentence imposed on S J alias S (The Applicant) was set aside and he was detained at the Presidents Pleasure. The Applicant now petitions this Court seeking the following orders:-.

1. **An order for a retrial of the Petitioner's case in the wake of new and compelling evidence in light of Article 50(6)(b) of the Constitution of Kenya and in the interest of Justice.**

2. **The review of the Petitioner's case in line with the provisions of Article 23(3) of the Constitution and in the interest of Justice.**
3. **An order the release of the Petitioner form prison in line with the latest High Court decision HCCRA No. 109 of 2012 DERRICK OCHIENG, OCHIENG VERSUS REPUBLIC (Unreported).**
4. **Any other relief the Honourable Court may deem fit and just to grant in the interest of justice considering the circumstances of the case.**

2. Some brief background. In Busia Criminal case No. 425 of 2002, the Applicant was charged with Robbery with violence contrary to Section 296(2) of the Penal Code and convicted on 13th December 2005. Thereafter the Accused was sentenced to Death.

3. The record of the trial proceedings shows that on 24th March 2005, he Applicant raised a question of his age as follows

" **I was beaten represented (sic) by other remandees. I am 16 years**"

The Court then ordered that the Accused be subjected to an age assessment. The order does not seem to have been followed through and the trial was completed and sentence imposed without the Applicant being subjected to an Age Assessment.

4. It now turns out following an age assessment conducted by Dr. Patson Kubuta on 23rd June 2015, that the Applicant was indeed 16 years old at the time of conviction and sentence on 13th December 2005. The argument by the Applicant is that as a minor a Death sentence could not have been imposed on him. The Applicant through Counsel asked this Court to find, like Justice Chemitei in **Kisumu Criminal Appeal No. 109 of 2012 Derrick Ochieng Ochieng Vs Republic,** that the maximum sentence that can be imposed on a child above 16 years is a stay in a Borstal Institution for a period of three (3) years.

5. Mr. Owiti for the State thought that the Application was meritious and in conceding to the application urged the Court to consider that evidence of the age of the Applicant and that decision in **Ochieng** (supra) would amount to new and compelling evidence in terms of Article 50(6) of the Constitution 2010.

6. Although I am sympathetic to the Applicant, I do not share the view of his Counsel and the State Counsel that the Petition is for allowing. The question of the age of the Accused in the context of the Sentence imposed was an issue raised at an Appeal before the Court of Appeal. And the issue was not peripheral or marginal.

7. A substantial part (4 pages out of the 19 pages) of the Court of Appeal Decision discussed the question of age and sentence. And the Court of Appeal resolved, in favour of the Applicant, that his age was 16 at the time he committed. The Court in doing so stated:-

> **As the position obtaining now is that we do not know what action the trial court and first appellant court would have taken and their minds have been drawn to this aspect, and as the Appellant's assertion that his age was 16 was not disputed, as no age assessment was carried out, <u>we give the appellant the benefit of that doubt as to his age at the time the offence was committed.</u> In the case of <u>Boniface Liako</u> <u>Musima and two others vs Republic</u> – Criminal Appeal No. 283 of 2008, in which one of the appellants stated his age but the court took no action on his statement this court had this to say-**
>
> **"On sentence, Mr. Njuguna submitted before us that the 1st Appellant's death sentence was illegal. In his view 1st appellant told the trial court, he was 17 years old on the date of sentence. Upon conviction appellants were asked to offer mitigation. The 1st Appellant who was the third accused is recorded as having said:**
>
> **" I am 17 years old."**

The other accused person did not say anything in mitigation. The trial Magistrate appears to have been incensed by this because he remarked:-

> **"Court: It is surprising that none of the accused are remorseful of their heinous act. They therefore deserve to suffer death penalty. Each is sentenced to death by hanging."**

He did not inquire as to the actual age of the 2nd appellant. There is no evidence on record to show a different age from that which 1st appellant gave. The issue was not raised before the superior court. In the circumstance the order which commends itself to us to make is that appeals by the 1st and 3rd appellant are dismissed. The 2nd appellant's appeal against conviction is also dismissed but on sentence the sentence of death passed against him is hereby set aside, and in lieu thereof we order that he shall be detained at the President's pleasure."

That case was, on salient points the same as the case before us except that in this case the appellant stated his age even before the trial proper began whereas in that case he stated it after the hearing proper and conviction but before sentence. In both cases the court did not inquire as to actual age of the appellant and in both cases matter was not raised in the first appellate court. The Court differently constituted allowed appeal on sentence even without age assessment being made. (my emphasis)

8. Indeed the Appeal by the Applicant succeeded only on sentence. In conclusion the Court of Appeal held;

> **We to feel that had the two courts directed their minds to the allegations of the appellant that he was 16 years old at the time the offence was committed, they might have come to a different conclusion on the sentence as a minor could not be sentenced to death. This is a proper case for our interference with the sentence. The appeal against conviction is dismissed but the appeal against sentence succeeds and the sentence of death imposed upon the appellant is hereby set aside. In its place the appellant shall be detained at the President's pleasure. Order accordingly.**

9. A Petition under Article 50(6) of the Constitution 2010 will only succeed 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.**

Both requirements must be met. Even if I was to agree with Counsel (which I do not) that the decision in Ochieng (*supra*) amounted to new and compelling evidence, I would still have to reject the petition because the Applicant's Appeal to the Court of Appeal on sentence infact succeeded.

10. The impression I get is that the Applicant is displeased by the Order of the Court of Appeal after allowing the Appeal. But it cannot be in the place of this Court to set aside or review or to make an Order whose effect is to set aside or review the Decision of the Court of Appeal. I am invited to commit a Judicial aberration. No, I am not prepared to do so!

11. It seems to me that an avenue available to the Applicant is to Petition the President, (through the Advisory Committee on the Power of Mercy) to exercise the Power of Mercy under Article 133(1) of the Constitution.

12. Sadly, I must disallow the Petition. It is hereby dismissed.

Dated, signed and delivered at Busia this 16th day of November 2015

F. TUIYOTT

J U D G E

In the presence of:-

C/Assistant - Oile

Owiti - for State

Mr. Okeyo h/b for Vadanga - for Applicant