



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NOS. 47, 48 AND 49 OF 2012 (CONSOLIDATED)

IN THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006, ARTICLE 262 (19) OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

AND

IN THE MATTER OF ARTICLE 21(1)(4), 22 (1) 3 (C) OF THE NEW CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLE 25 (A), (C) (D), 26 (1), 27 (1) (2) AND (4), 28, 29 (A) (D) AND (F), 48, 50, (2) P, 6 (A) (B) AND ARTICLES 21 (1), (3).

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 203 AS READ WITH SECTION 204 OF THE PENAL CODE

AND

IN THE MATTER OF SECTION 324 AND 329 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

DAMASCUS OMBIMA 1ST PETITIONER

JULIUS OBARA KENYANYA 2ND PETITIONER

SILAS OMWAMI OBUTO 3RD PETITIONER

VERSUS

REPUBLIC.....

JUDGMENT

1. The petitioner herein Silas Omwami Obuto has moved this court by a petition dated 26th July 2012 seeking the following reliefs:-
 - a. *A declaration that the death sentence imposed on your petitioner was arbitrary inappropriate and that the same was imposed to violation of the right to life and fair trial as envisaged under **Article 26 (1), (3) and 50 (2) and Section 324 and 329 of the Criminal Procedure Code** on mitigation which was never offered and/or if offered was never considered and consequently set the sentence aside.*
 - b. *For an order that your petitioners' case be remitted to the High Court so that he can have the opportunity to offer mitigation hitherto denied and his case be determined whether the sentence is proportionate to the petitioner's criminal capability according to **Article 50 (2) (p) of the Constitution of Kenya**.*
 - c. *A declaration that the charge against the petitioner [under] **Section 296 (2) of the Penal Code** is defective as the same is not read with **Section 295 of the Penal Code** which defines the offence of robbery thereby violating **Article 50 (2) (b) of the Constitution of Kenya** and should be struck out.*
 - d. *That your humble petitioner be granted such other reliefs as the court may deem appropriate and just to grant under the circumstances.*
2. The petition is supported by the petitioner's own affidavit sworn on the 26th day of July 2012 where he states that the death sentence imposed on him by the Senior Resident Magistrate's court at Oyugis was upheld by the Court of Appeal. Secondly that he was convicted of an offence that was not defined in the charge sheet in contravention of the Constitution under Article 50 (2) (b) of the Constitution of Kenya and since he was not informed of the charge in sufficient detail to answer to it the charge sheet used to convict him was fatally defective and incurable and therefore he ought to be set free under the circumstances.
3. He states further in his affidavit that his constitutional rights were violated by the prosecution because he was tried and convicted on a defective charge sheet. That his right to life was taken away contrary to procedure by law established when he was convicted in breach of **Article 26 (3) and Article 50 (2) (b) of the Constitution** and that the sentence of death imposed on him by the Magistrate's court is inhuman, and a cruel form of punishment.
4. He adds that the mandatory death sentence fettered the trial court from exercising discretion on sentencing as provided by **Section 324 and 329 of the Criminal Procedure Code** and that he did not exercise his right of mitigation under **Section 329 of the Criminal Procedure Code** and if he did the same was not considered as the mandatory death sentence under **Section 296 (2) of the Penal Code** did not allow discretion of the sentencing authority.
5. He emphasizes further that the mandatory death sentence meted on him is a torturous inhuman and degrading treatment contrary to **Article 25 and 50 of the Constitution of Kenya**.
6. The petition was served upon the Director of Public Prosecution who never filed any response. On 25th October 2012 petition No.47, 48 and 49 were consolidated to proceed under petition No. 47 of 2012 after Mr. Mochere advocate for the petitioners made an application to that effect. The issues in petition No.48 of 2012 and No.49 of 2012 are more or less the same as the ones in petition No.47 of 2012 save that the petitioner in Petition No.48 of 2012 is **JULIUS OBARA KENYANYA** and in Petition NO.49 of 2012 is **SILAS OMWAMI OBUTO**. They are all represented by the same counsel, Mr. Mochere.
7. In petition NO.48 of 2012 one of the prayers sought that is slightly different is **"a declaration that Section 204 of the Penal Code is inconsistent with the constitution and ought to be declared a nullity to the extent that it is ultra vires Articles 26 (1) (3), 27 (1) (3), 28, 48, 50 (1) (2) of the Constitution."**
8. The court gave directions for filing of written submissions and authorities to be relied upon but the respondents did not comply to the same. On the 3rd December 2013 the matter came for

- highlighting. Mr. Mochere appeared for all the three (3) petitioners whereas Mr. Majale represented the respondent.
9. In his submission Mr. Mochere gave the background of the three petitions as follows:-
 10. In Petition No.47 of 2012 the petitioner was convicted of murder and is serving life sentence after commutation of service. That the petitioner Julius was a school boy then but today he is a young man still in jail and lastly that the appeal to the Court of Appeal was dismissed.
 11. In Petition No.48 of 2012 the petitioner therein was convicted under **Section 296 (2)** of the **Penal Code** and is also serving life sentence. His appeal to the court of appeal was also dismissed. Lastly in petition No.49 of 2012 the petitioner was also convicted of robbery under **Section 296 (2)** of the **Penal Code** and though he did not exercise his right to appeal to the High Court, he submits that under **Article 50 (6) (a)** the petitioner is entitled to make this application for a retrial.
 12. He submits that the petitioners are before the court on questions of fundamental human rights and that it is not an appeal. He urges that the petitioners rights were previously available under **Section 84 (1)** of the repealed constitution but are now enshrined under **Article 26** of the new Constitution. He adds that the petitioners are alleging that their fundamental rights during the trial process were denied because **Section 216** and **329** of the **Criminal Procedure Code** which requires that mitigating circumstances be heard before sentencing were not complied with. He submits that mitigation was a must since the penalty for murder and robbery under **Section 296 (2)** was death meaning the hands of the sentencing authority were tied.
 13. It is Mr. Mochere's submissions that following developments in the Law, the Court of Appeal sitting in **Criminal Appeal No.17 of 2008 – Godfrey Ngotho Mutiso –vs- Republic** said that the mandatory provisions in murder cases are unethical to the constitution. That in other words the sentencing court has the authority and the jurisdiction to look at each individual case before sentencing.
 14. That what the petitioners are saying is that though they committed an offence they do not deserve the sentence they are serving. That in the **Mutiso case** the DPP admitted that the mandatory provisions under **Section 204** as read with **Section 203** of the **Penal Code** are unconstitutional and so Mutiso was sent back to the trial court for mitigation.
 15. Other authorities cited by counsel for the petitioners are **Protus Builiba Shikuku –vs- Honourable Attorney General – Constitutional Reference No.3 of 2011** in which the High Court interrogated a matter that had gone all the way to the Court of Appeal, and held that in such a case where a question of fundamental rights has arisen the High Court has the right to interrogate the matter. The

court quashed the life sentence and released the petitioner.
 16. Counsel urges this court to look at this new window that has been opened in criminal law and look at the petitioners cry for justice and review the matter on the issue of fundamental rights. He submits that on those grounds as enumerated in the petitions, (they are not challenging the conviction) this court ought to impose a sentence in the alternative.
 17. Mr. Majale in response has opposed the petition. He submits that the petitioners' counsel has brought to the attention of the court that all the three (3) petitioners are serving life sentences and that the 1st and 2nd petitioners had the opportunity to appeal and their appeals were dismissed while the 3rd petitioner never exercised his right of appeal and going by the provisions of **Article 50 (6) (a)** the 3rd Petitioner does not have any grounds for a re-trial because he would only have an avenue for the same in circumstances where his appeal had been dismissed by a higher court or where he did not have the opportunity to appeal within the stipulated time and in addition there must be new and compelling evidence. He submits that the 3rd Respondent does not meet those conditions.
 18. On the issue of sentence Mr. Majale submits that counsel for the petitioners contends that the lower court did not allow the petitioners to mitigate. He submits further that even where mitigation is given the court is not bound to consider those mitigating circumstances before passing sentence, this part of the sentence being merely a procedural feature. He adds that since 1st and 2nd petitioners had a chance to appeal they ought to have brought out the issue on appeal. He urges the court to consider section 216 and 329 of the Criminal Procedure Code. He submits that so far the death sentence as provided by statute has not been repealed and the lower court in

- passing the sentences complained of based their decision on the provisions of **Article 24(3)** and **26 (3)** of the **Constitution**. Further that the provisions of **Section 26** of the **Criminal Procedure Code** must have swayed the mind of the trial court which passed the respective sentences.
19. He submits further that the issue of the death sentence is contentious and there is growing jurisprudence on the law but the written law does not expressly bar the same.
 20. He urges this court not to allow the petition as it would be a bad precedent whose only import would be to open a pandoras box for convicts serving such sentences coming to the High Court to have their sentence quashed.
 21. Before determining the issues raised herein it is important to make the record straight. In Petition 47 of 2012 the petitioner SILAS OMWAMI OBUTO was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** of which he was convicted and sentenced. He was not convicted of murder as submitted by counsel for the petitioners.
 22. In petition 48 of 2012 the petitioner therein was charged with the offence of murder contrary to section 203 as read with **Section 204** of the **Penal Code**. He was subsequently convicted and sentenced. He was not convicted of the offence of robbery with violence as submitted by counsel for the petitioners.
 23. The 2nd petitioner herein was convicted for the offence of murder contrary to section 203 as read with section 204 of the penal code. Section 203 of the penal code reads “**any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder**” and **Section 204** reads as follows:- “**any person convicted of murder shall be sentenced to death.**”
 24. **Section 296(2)** of the **Penal Code** reads “**If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death**”.
 25. It is common ground in all the three petitions that the petitioners that the death sentence which was commuted to life imprisonment was a violation of their fundamental human rights. I have read in depth the submissions by counsel for the petitioners Mr. Mochere. It is his contention that death is not the only sentence available to this court in respect of the conviction entered against the petitioners.
 26. In my understanding a person can either be charged with a felony or misdemeanor. In all instances where a person is convicted for a misdemeanor, the court is granted the liberty to impose a sentence within its discretion. There are instances where the maximum/ceiling is set by the statute. In my view in all cases of misdemeanor, the gravity of sentence imposed is left to the trial court. However where a person is charged and convicted of a felony, the statute either fixes the minimum or maximum and even sometimes gives a leeway to the court to impose a discretionary sentence. Furthermore there are instances where the hands of the court are tied by the relevant statute or section as to the manner and specific sentence so imposed for example under the **Sexual Offences Act No. 3 of 2006** and the **Psychotropic Substances Act, No.4 of 1996**.
 27. My understanding of the law on this issue is that, when it comes to sentencing, the section either uses the words “shall” or “**is liable**”. Where the word “**shall**” is used or employed, the discretion of the court has been deliberately and intentionally restricted by Parliament. If parliament in its wisdom has restricted the liberty of the court, it is not the duty of the court to put words or meaning which are non-existent in the statute or particular section of a Statute.
 28. It has been argued that the Court of Appeal in **Godfrey Ngotho Mutiso –vs- Republic [2010] e KLR** held that imposition of the mandatory death sentence for a person convicted for murder or robbery with violence contrary to **Section 296 (2)** is inconsistent with the letter and spirit of the constitution. The Court of Appeal in that decision recognized and appreciated that the former constitution recognized the death penalty imposed as being lawful. The Court went further and stated that the Constitution does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. The court then declared that **Section 204** of the **Penal Code** to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution. Was that the case or position in so far as the

former constitution is concerned?.

29. **Section 7(1)** of the former constitution provided;

“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the laws of Kenya of which has been convicted”.

30. The key words in the said section are no deprivation of life save in execution of a sentence imposed in respect of a criminal offence under the Laws of Kenya of which he has been convicted. The criminal offence leading to the deprivation of life must be one known and recognized under the laws of Kenya. There must be a conviction resulting from a criminal trial. It is important at this stage to restate that the offences of which the petitioners herein were convicted are clearly provided for under the Penal Code. The deprivation of life through a criminal sentence is in my view a lawful act recognized under the former constitution.

31. In the current constitution **Article 26(1)** states **“every person has a right to life”**, while **Sub Articles 3** thereof reads:-. **Section 26(3)** **“a person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law.”**

32. Under **Article 26(1)** the **Constitution** defines or has a basic principle of law, the right to life. However the constitution does not declare in any absolute and clear manner that the said right should be enjoyed without any restriction or inhibition. Under **Article 26(3)** the **Constitution** imposes an encumbrance or a restriction that the said right cannot be absolute. The right to life can be taken away or deprived through written law or in a manner indicated by the Constitution.

33. It is well known that the constitution is like a main structure which is to be filled with details through legislation, policy or where it is not clear an interpretation from the court. Under **Article 24(1)** of the **Constitution**, a right or fundamental freedom can be limited or restricted in its enjoyment through written law, in so far as the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom. In doing so one key factor is the importance of the purpose of the limitation. Perhaps it is important to understand the basis and purpose of imposing a particular sentence for a particular offence. The paramount consideration in sentencing in criminal law is the safety of the society and the abhorrence of transgression against fellow citizens or human beings.

34. Our constitution is the legal and legitimate expression or reflection of the collective will or aspiration of the people and because it is the supreme law which lays the frame work and foundation for a democratic society. The people of Kenya have stated in the constitution the manner in which their affairs are to be governed by the Executive, Legislature and the courts. They have full confidence in the legal system which is based on the will of the people. In that regard every citizen has equal protection in the eyes of the law. The court must respect and comply with the provisions of the constitution and statute as they reflect the will of the people. The will of the people is generally manifested through legislations enacted by parliament and such legislation must be in conformity with the letter and spirit of the constitution. Largely the Constitution and statutes are a reflection of our values and customs. If Kenyans preferred the abolition of the death penalty, nothing would have been much easier then to express that in the Constitution and in the Penal Code.

35. The abolitionist theory is largely and overwhelmingly focused or based on the rights of the living. Justice must address itself to the dead and the living beings in the same manner. The focal point of the abolitionist is to promote human rights and respect for the rule of law. Our laws as currently drafted and enacted provide for the imposition of the death penalty though this is what obtained under the Mosaic Law. Nothing more, nothing less. It is the courts obligation to implement and enforce the law as it is and not according to the best practices in existence. I do appreciate the petitioners counsel for the well researched submission and the authorities he used.

36. In any case who has said that the death penalty is repugnant to our sense of justice and morality? The debate about right to life is in my view one sided and does not reflect the rights of the deceased and his family members. We cannot afford to forget the painful and devastating side of the victim. In my understanding, it is an imparted theory which is likely to cause grave injustice to many Kenyans who are deprived of their loved ones. It is a miscarriage of justice to say that

our statutes or Constitution prohibit the imposition of the death sentence. It is true that the death sentence deprives one of his rights to life, but it is done within the boundaries of the law, therefore lawful.

37. It has also been alleged that the death penalty is a cruel and

inhuman punishment but what about the loss of life as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts to inhuman treatment no matter who is affected. The person who is responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family. There are circumstances where the offence had been planned and executed in a cruel and inhuman and degrading manner. Would one say that the death in such a case is justified?

38. The courts must therefore impose the correct and lawful sentence provided under our law. My position is that the law as currently in existence provides for death penalty. I am of the humble view that the available sentence for a person convicted for murder as the law stands today is death. I stated in my recent decision in **Kisii cr. Misc. Application No.36 of 2011 – Caleb Nyangau Manyiza** that there is need for more conversation on this issue by all stakeholders before a final decision is made.

39. Petitioners other complaint regards the charge sheet. It was argued by the petitioners counsel that the charge as framed was defective as the 1st and 3rd petitioners were charged under **Section 296(2)** of the **Penal code**. According to counsel the appellants should have been charged under **Section 295** as read with **Section 296(1)** and **(2)** of the **Penal Code** because it is **Section 295** of the **Penal code** that defines robbery. In his view **Sections 296(1)** and **(2)** merely prescribe the punishments for the offence of robbery and the offence of robbery with violence. In addition counsel argued that the charges as framed did not conform to the rules and that the petitioners were convicted of an offence that was not defined in the charge sheet in contravention of the Constitution under **Article 50 (2) (b)** of the **Constitution of Kenya**. **Article 50(2)(b)** provides as follows:-

**“(2) Every accused person has the right to a fair trial which
includes the right-
(a).....
(b) to be informed of the charge with sufficient detail
to answer it.”**

40. This issue has been dealt with in **Simon Materu Munialu –vs- Republic [2007] e KLR - Criminal Appeal 302 of 2005**. The issue was whether a charge sheet citing only **Section 296(2)** of the **Penal Code** was sufficient. The Court of Appeal considered the submission that **Section 295** of the **Penal Code** creates the offence of robbery but held that:-

“.....the ingredients that the appellant and for that matter any suspect on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is Section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in Section 295 which creates the offence of robbery. In short Section 296(2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under Section 295 as read with Section 296(2) of the Penal Code as that would not contain the ingredients that are in Section 296(2) of the Penal Code and might create confusion.”

41. In considered view **Section 137 of the Criminal Procedure Code** would be complied with an accused person is charged, as the appellant was under the **Section 296(2)** because that **Section 137** requires one to be charged under the section creating the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal.
42. The above was also the position in the case of **Joseph Onyango Owuor & Cliff Ochieng Oduor –vs- Republic [2010] e KLR - Criminal Appeal No. 353 of 2008** where the court was again confronted with a similar situation. In that appeal the appellants had submitted that **Section 296(2)** of the **Penal Code** does not create an offence but merely makes provision for the punishment for robbery with violence. The court then stated that “**Section 295** of the **Penal Code** is merely a definition section and held that “**Section 296(1)** and **296(2)** of the **Penal Code** deal with the specific degrees of the offence of robbery and have been framed as such”.
43. I agree that this is the correct proposition of the law. Indeed as pointed out in **Joseph Onyango Owuor & Cliff Ochieng Oduor –vs- Republic** (Supra) the standard form of a charge contained in the second schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law and that is **Section 296**. Therefore the offence of robbery with violence ought to be charged under **Section 296(2)** of the **Penal Code**. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, or is in the company of others or if he uses any personal violence to any person. It would not be correct to frame a charge for the offence of robbery with violence under **Section 295** and **296(2)** as this would amount to a duplex charge.
44. The last point I will address is the issue as to whether the trial court considered the mitigating circumstances under **Section 329** of the **Criminal Procedure Code**. Counsel for the Petitioners Mr. Mochere contends that the petitioners’ fundamental rights during the trial process were denied because **Section 216** and **329** of the **Criminal Procedure Code** requires that mitigating circumstances be heard before sentencing. He further told the court that mitigation was a must since the penalty for murder and robbery with violence under **Section 296(2)** was death meaning the hands of the sentencing authority were tied.
45. Mr. Majale for the respondent told the court that even where mitigation is given the court is not bound to consider those mitigating circumstances before passing sentence. He contends that this is a procedural feature of sentencing and that the petitioners ought to have brought out the issue on appeal. There is only one mandatory sentence that is prescribed by the law that is to be meted out against a person convicted under **section 296(2)** and **Section 203** as read with **Section 204** of the **Penal Code**. This is the mandatory sentence of death, although in the recent past courts have imposed various terms of imprisonment including life imprisonment.
46. The allegation that the petitioner were not accorded an opportunity to mitigate is therefore very far from the truth. The question therefore lies as to whether there is any other sentence available as penalty for the offences that the petitioners have been convicted for.
47. In **Godfrey Ngotho Mutiso** (supra) the Court was of the opinion that the findings it had made with regard to **Section 204** of the **Penal Code** could extend to other capital offences. It stated that:-

“We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3) robbery with violence under Section 296(2) and attempted robbery with violence under Section 297(2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with Section 204 of the Penal Code might well apply to them.”

48. The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there have been convictions for capital offences. In effect the holding in this case introduced sentencing discretion to judicial officers in murder cases. I do hold that the decision in **Godfrey Mutiso –vs-R** to be per incuriam in so far as it purports to grant discretion in

- sentencing with regard to capital offences. See **Caleb Nyangau Manyiza case** (supra)
49. My reading of the law shows that the offences of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, treason contrary to section 40 of the penal code, robbery with violence contrary to **Section 297 (2)** of the **Penal Code** still carry the mandatory sentence of death, until such a time that the law will be changed.
50. The best the court can do is to exercise judicial authority conferred upon it in accordance with article 159 of the Constitution and interpret and apply the law in the manner envisaged. Stamp L.J. in **Blackburn –vs- Attorney General (1971) EWCA Civ. 7** stated as follows:- **“Parliament enacts laws; and it is the duty of this court in proper cases to interpret those laws when made, but it is not part of this court’s function or duty to make declarations in general terms regarding the powers of parliament, more particularly where the circumstances in which the court is asked to intervene are purely hypothetical.”**
51. Should Kenyans decide that it is time to remove the death sentence from the statute books, then they shall do so through their representatives in parliament. In the mean time the sentence of death shall continue to be imposed upon conviction in cases where the law so provides.
52. In the premises I find that the consolidated petition herein is devoid of merit and it fails in its entirety.
53. Orders accordingly.

Dated and delivered at Kisii this 22nd day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Kaburi h/b for Mr. Mahere (present) for Petitioners

Mr. Majale (present) for Respondent

Mr. Bibu - Court Assistant