



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL MISC. APPLICATION NO. 21 OF 2012

BOND DAVID ONYANGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original SRM'S CRC No. 765 of 2003, Kisumu HCCRA No. 143 of 2005 & Court No. 312 of 2007)

J U D G M E N T

By his petition dated 13-3-2012 the applicant prays for the following reliefs:

- 1) A declaration that the death sentence meted out to the petitioner by the trial court and later commuted to life imprisonment by the president was unlawful violation of right to life and fair trial as per articles 26 (1) (3), 50 (2) (b) (p) and 165 and be set aside forthwith.**
- 2) An order be issued by this honourable court to remit the petitioner's case to the High Court for an opportunity to offer mitigation and peculiar circumstances in compliance with article 50 and section 324 and 329 CPC to arrest the death sentence and any other sentence issued.**
- 3) The honourable court to review the petitioner's case in accordance with article 50 (2) (p) of the Constitution, set aside the death sentence and substitute it with the period already served in prison and any other relief the court may deem fit and just to grant in interest of justice.**

The facts herein are clear and straight forward. The applicant was charged with the capital offence of robbery with violence contrary to section 296 (2) of the penal code. On 20-7-2005 he was convicted and sentenced to death. His appeal to the High Court was rejected on 14-6-2007 in a two bench decision. He proceeded to the Court of Appeal where his appeal was dismissed on 5-12-2008. Apparently the death sentence was commuted to life imprisonment by the president.

The application or petition before us is premised on the grounds that the trial court failed to evaluate the evidence before it and had it done so it would have not left behind some key evidence which the appellants now seeks to introduce. He argues that there are other key compelling new evidence in particular the failure on the part of the trial court to allow the applicant to mitigate in line with section 324 and 329 of the Criminal Procedure Code.

The applicant further contends that the death sentence meted against him was unconstitutional. He in

particular hides under the provisions of Article 50 of the Constitution as well as rules 23 (3) of the same.

The state opposed the application vide the replying affidavits of George Mogere and Peter Kiprop. The two affidavits argued that this court does not have jurisdiction to entertain this application and that he has not demonstrated which rights have been violated.

We have perused the proceedings herein and in particular the judgment from both this court and the Court of Appeal. From the onset the applicant suggested that he was not opposed to the sentence but he inched his submissions on the fact that he was not allowed to mitigate. We have perused the lower courts submission and it is clear that after conviction the applicant was allowed to mitigate but he chose to ask for proceedings.

It is not lost to this court that the applicant cannot reopen this case afresh unless there are such new evidence that the trial court omitted and they are of such a nature that if introduced the circumstances obtaining would indeed be altered. We have anxiously perused the same and we do not think respectfully that there are any such new evidence. Both this court as well as the Court of Appeal in our view reevaluated the trial court's findings and agreed with it. We cannot therefore sit on the appeal on the two findings.

As to whether the provisions of the Constitution were violated, we respectfully do not find any basis to agree with the petitioner.

The question of the petitioner having not been accorded a fair hearing under the provision of Article 50 of the current Constitution holds no water. There was never any challenge during the main trial or at least during the appeal processes on this ground. The same is to say the least an after thought.

We think we have said enough to disallow this petition. The death sentence is still within our statutes and as long as it exists the courts hands are tied. It is therefore the responsibility of the citizenry to lobby the legislature to abolish it from our statute books.

We think that the petition herein was a trial and error attempt by the petitioner to challenge what has already been passed by the three courts. The same is dismissed.

Dated, signed and delivered at Kisumu this 25th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI

JUDGE

E.N.

MAINA