REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CRIMINAL APPLICATION NO. 30 OF 2013

ELIUD MOSES APWAPO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The undated petition filed on 3-3-2014 by the petitioner prays for the following reliefs:

1. **A declaration that the death sentence expressly imposed without regard to section 329 of the Criminal Procedure Code was violation to fair trial.**
2. **A declaration that section 296 (2) of the Penal Code should and ought to have been proceeded by section 329 of the CPC during sentencing.**
3. **A declaration that there is no legal time frame within which a denial of fundamental right is to be raised before a High Court in its capacity as the constitutional court.**
4. **A declaration that the High Court in its mandate under Articles 23 (1) (3) as read with 165 of the Constitution has the legal authority to open the matter herein in the interest of upholding and protecting the fundamental rights of the petitioner.**
5. **An order that the matter herein be referred to High Court or even trial court for purposes of mitigation against the maximum sentence, pursuant to the provisions of section 329 CPC and in the interest of upholding the rights enshrined in Article 50 (2) (P) of the Constitution.**

The petitioner was charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The particulars were that on the 2nd day of August 2007 he robbed one Marshall Tito Obonyo of several assorted items. He was equally charged with two other counts of handling stolen goods and being in possession of narcotic drugs namely 90 rolls of bhang.

The trial court on 12-5-2008 convicted him of all the offences and sentenced him to death on the 1st count and to serve 4 years imprisonment on the 2nd count.

His appeal to the high court was dismissed by Justices Mwera (as he then was) and Karanja on 1-12-2009.

Being dissatisfied the he moved to the court of appeal and on 8-11-2013 Justices Onyango Otieno, Azangalala and Kantai dismissed his appeal. He then filed the present petition.

We have read the said petition as well as the supporting authorities. We have also perused the applicants written submissions as well as heard the oral submissions before us. The state opposed the application via the replying affidavit of George Mongare sworn on 24-4-2014.

What we deduce from the petitioner's case is that in principle he is not opposed to the fact that the

trial from the lower court to the court of appeal took place. Neither is he opposed to the sentence, but his argument is that the court did not comply with section 329 of the Criminal Procedure Code where he ought to have been granted an opportunity to mitigate before sentencing. Section 329 states as follows:

> **"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed".**

Our understanding of this portion of law is that ordinarily regardless of the nature of the sentence the trial court ought to give a chance to the accused person to offer what is ordinarily called "mitigation" before a sentence is passed. This mitigation entails the accused telling the trial court why the sentence should be mitigated in any way and in practical terms the courts have even required further evidence if need be for instance a probation report or such other personal details of the offender. The practice however is that the accused persons in most cases explain their personal lives and how if they are given custodial sentence it shall affect their lives etc.

The drafters of section 329 of the CPC therefore expected that regardless of the sentence every accused person is to be given an opportunity to mitigate or to say anything before sentence.

In the present matter it is appreciated that the applicant was given such an opportunity with his co-accused. The proceedings from the lower court testify that much. The prosecution told the court that the petitioner had been sentenced to serve 4 months jail for being in possession of narcotic drugs of which he replied:

"I agree I have a previous conviction on drugs and was jailed for 4 months".

Court: previous conviction proved.

Then it proceeded

"Accused 1 in mitigation

"I seek help to have my properties that are in the police given to my people. I apply for proceedings".

After hearing the 2nd accused the court acknowledged that it had heard the mitigating circumstances and proceeded to sentenced the accused appropriately.

In the premises we do find that although the trial court did not directly refer to section 329 of the CPC it offered the applicant the opportunity to mitigate which he proceeded to do. It is not true then that his rights were breached at all.

Further we do not find this argument plausible at this level. This court through Justices Karanja and Mwera reached its decision and this issue was never raised. The same was not raised at the Court of Appeal. This court is not sitting on its appeal again neither is it called to review the judgment.

We further do not find that there was any error by the trial court when it handed the appellant the mandatory death sentence. There is no other prescribed punishment in our statutes when an offence under section 296 (2) is committed. Respectfully therefore the court had to do what it did and we do not find any breach of the applicants fundamental right as envisaged under Article 27, 50 or even 159 of our robust constitution.

As to reopening of the case afresh the same is untenable as this court is guided by the decisions of the Supreme Court in **Samuel Kamau Macharia & Another -VS- Kenya Commercial Bank Ltd [2012] eKLR** where the learned Judges rendered themselves as follows:

> **"In the matter before us the question is not whether the appellants seeks to rely on a law that**

has retrospective effect. The sole issue to consider is whether the applicants can reopen a case that was finalised by the Court of Appeal (by then the highest court in the land) before the commencement of the Constitution 2010. Decisions of Court of Appeal were final. The parties to the appeal derived rights and incurred obligation from the judgment of the court. If this court was to allow appeals from cases that had been finalised by the Court of Appeal before the commencement of the Constitution of 2010 it would trigger a turbulence of pervicous proportion in the private legal relations of the citizens".

We do find then that the appellant had all the opportunity to raise any issue during the appeal process. As a matter of fact the Court of Appeal delivered its judgment on 8-11-2013 when the current 2010 Constitution was long implemented. If at all he felt aggrieved by the decision of the court of appeal he had the chance of moving ahead to the supreme court.

It is our humble view therefore that by allowing the petition herein, we would be permitting the petitioner to open this case afresh and thus creating a forum for lodging a collateral attack against the decision of the appellate court.

We think we have said much to reach our conclusion that this petition is unmeritorious and the same is hereby disallowed.

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

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

JUDGE **JUDGE**