



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 5 OF 2013

GEORGE NGANGA MAINA.....1ST PETITIONER

RAPHAEL GURU MAINA.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

- 1). The petitioners herein seeks the following reliefs:
 - a. **A declaration that the death sentence imposed on them and subsequently committed to life imprisonment was arbitrary, excessive and disproportionate as the same was imposed in violation of the right to life and fair trial and section 329 of the Criminal Procedure Code.**
 - b. **For an order that the petitioners case be remitted to the High Court for review to offer mitigating circumstances and determination of the proportionality of sentence in line with constitutional guarantees envisaged under Article 23 (3) of the Constitution.**
 - c. **In the alternative the petitioners case in line with Article 50 (2) (p) of the Constitution set aside the excessive sentence imposed by the trial court and substitute it with the period already served in prison in the interest of justice and a declaration that judicial discretion on sentencing was not exercised when sentencing the petitioners under section 204 of the Penal Code and that this discretion be exercised in regard to the petitioners sentence in the interest of justice.**
- 2). The petitioners premised their case on the following grounds:
 - a. **that section 204 provides for mandatory death sentence which fetters the trial court from exercising its constitutional discretion under section 324 and 329 of the Criminal Procedure Code.**
 - b. **That the ingredients of murder prescribed under section 203 of the Penal Code were not proved against them.**
 - c. **That they have been arbitrarily deprived of their right to life guaranteed under section 26 (1) and (3) of the Constitution.**
 - d. **that they were not accorded a fair hearing as is envisaged in Article 50 of the Constitution.**
- 3). It is worthy to note that the petitioners had been convicted vide Malindi High Court Criminal Case No. 6 of 2006 of murdering one John Maina Gacheru. Their appeal to the Court of Appeal vide Case No. 445 of 2007- Mombasa was also dismissed on 24-7-2009.
- 4). In their written as well as oral submissions the petitioners laid much emphasise on the case of

Godfrey Ngotho Mutiso -VS- Republic [2010] eKLR Civil Appeal No. 17 of 2008 which has been declared per incuriam.

5). The state opposed the petition arguing that the petitioners were accorded a fair hearing during trial both in the High Court and in the Court of Appeal. The learned state counsel argued that Article 26 of the Constitution though it guarantees right to life, the same is not absolute and it could be fettered. He submitted that the issues raised by the petitioners could as well have been raised during trial and more importantly on appeal stage.

6). Having heard the parties, the issues for determination can be summarised as follows:

1. **Whether the death penalty prescribed by the penal code under its various sections constitutes inhuman or degrading treatment or punishment, contrary to Article 25 (a) (c), 26 (1) and 29 (a) (d) (f) of the Constitution.**
2. **Whether section 204 of the penal code that prescribe the mandatory death penalty upon conviction for the offence of murder is inconsistent with Article 50 and section 329 of the Criminal Procedure Code.**
3. **Whether the petitioners are entitled to the remedies prayed for.** This court shall endeavour to deal with each of the fundamental issues raised.

A). The Consistency of the Death Penalty.

7). The petitioners have argued that death penalty is both cruel and a degrading punishment and runs contrary to Articles 26 of the Constitution which reads:

“a) Every person has the right to life.

b) The life of a person begins at conception.

c) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law”.

8). Article 26 (3) above recognises that a person can be deprived of his life intentionally if the deprivation is to the extent authorised by the constitution or other written law. The situation in which a person's right to life may be curtailed are contained in the penal code section 24 which deals with various kinds of punishment and it provides death as one of the punishment. To the extent therefore that the same is grounded in the statutes it is immaterial to argue that it is unconstitutional.

9). In **Joseph Njuguna Mwaura & 2 Others -VS- Republic Criminal Appeal No. 5 of 2008** the Court of Appeal rendered itself as follows:

“Death as a penalty has been sanctioned by the constitution. We believe that as the court before us in Godfrey Mutiso -VS- Republic Correctly held:

“the death penalty remains a lawful sentence in Kenya and appears set to remain so for a long time to come”.

To suggest that the Articles of the constitution outlaw the death penalty is with respect a great damage to the people of Kenya and that is a remarkable departure from the tenets of the constitutional interpretation. We think we have said enough to show that the death penalty is, contrary to the appellant's arguments, grounded in the constitution”.

B. Inhuman and Degrading

10). Article 25 (a) and 29 faultlaws any form of torture, cruel, inhuman or degrading treatment or punishment. The daunting question is what is the effect of Articles 25 (a) and

29 (8) on the exception to the right to life. Did the framers of the constitution bend on taking away the qualification using Articles 25 and 29”.

Article 25 provides as follows:

“Despite any other provisions of this constitution the following rights and fundamental freedoms shall not be limited:

- a) **freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b) **.....;**
- c) **the right to a fair trial”.**

Article 29 states:

“Every person has the right to freedom and security of the person which includes the right not to be:

- a. **deprived of freedom arbitrarily or without a just cause;**
- b. **subjected to torture in any manner whether physical or**
- c. **psychological;**
- d. **treated or punished in a cruel inhuman or degrading manner”**

11). In the Ugandan case of **Kiguta & Other -VS- AG, 2005 AHRLR 197 (Ug CC 2005 (unreported)** the court stated the following regarding death penalty:

“In our case, Article 22 (1) recognises death penalty as an exception to the enjoyment of the right to life. That is a well known rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. It is important to note that the right to life is not included in Article 44 on the list of the non derogable rights. Accordingly, Articles 24 and 44 could not have been intended to apply to death. Penalty permitted in Article 22 (1). When articles 24 and 44 were being enacted, article 22 was still fresh in the mind of the framers. If they (framers of our constitution) had wanted to take away by article 24, the rights they recognised in article 22 (1), they would have done so in clear terms, not by implication. Imposition of death penalty therefore, constitutes no cruel, inhuman or degrading punishment. The various provisions of the Laws of Uganda which prescribes death sentence are therefore, not inconsistent with or in contravention of articles 24 and 44 or any provisions the constitution”.

12). It thus appears also that like the Ugandan Constitution the key conviction qualifies the right to life and provides that the right not to be subjected to inhuman and degrading treatment or punishment shall not be derogated from. Our constitution also provides a list of non derogable rights at its article 25 and life is not one of them. If parliament had intended that the right to life be absolute then nothing would have been easier than to include it under the said article 25.

13). In **Joseph Njuguna -VS- Republic (supra)** the court went further to say:

“Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain and that is disproportionate to the crime so that it causes moral outrage within the community. We do not think that the death sentence falls within these definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact it continues to exist in our statute books with constitutional underpinning”.

C). Mandatory Death Sentence.

The petitioners have argued that the mandatory death sentence fetters the court from exercising its discretion to determine the appropriateness of the sentence meted out. In other words the court had no option but to pass the sentence. That the same denied them the chance to mitigate the sentence.

14). Whereas this may be true and by extension gagging the court's discretion the court of appeal in Joseph Njuguna Mwaura (supra) has made a binding decision to this court when it inferred that declaring the mandatory death as unconstitutional would amount to usurping the mandate of parliament and revising the decision of the people of Kenya, made during the referendum. It goes on to say:

“In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act. Even under the new constitutional dispensation, this court cannot properly or legitimately review the decisions of the people of Kenya, made during the referendum, or those of the legislature when those decisions are lawful. To say otherwise would be to act in complete contravention of the constitution. As judges, our mandate is fidelity to the constitution and to the law. We cannot interpret the constitution and other statutes whimsically where No. 25 discretion or window has been provided. The right to life under Article 26 of the Constitution of Kenya 2010 has been fashioned in a specific manner to provide, or include, specific circumstances where life is limited, that is, to the extent is provided by law.

In our view, to say that there are other alternative sentence to the mandatory or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do”

D). Are the Petitioners entitled to the orders?

15). As regards the issue of mandatory death sentence being unlawful, I would not wish to add more save to state that following the decision in Joseph Njuguna Mwaura the Court of Appeal settled the matter and unless the same is overturned by the said court or the Supreme Court this court is bound by it.

16). Neither does this court think that they are entitled to the 2nd and 3rd prayers. They had the opportunity at the level of the Court of Appeal to have the same determined but they chose not to. If this court would allow the same it shall be reopening the case afresh which shall be tantamount to sitting on its appeal and by extension challenging the Court of Appeal decision which in our jurisdiction is unacceptable.

Consequently, and based on the above reasons this petition is hereby dismissed.

Dated, signed and delivered at Kisumu this 17th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI