



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Petition 61 of 2012

JOSEPH BAARIU IMIEMBA1ST PETITIONER

JOSEPH KABERIA KAINGA2ND PETITIONER

VERSUS

HON. ATTORNEY GENERALRESPONDENT

JUDGMENT

1. In the petition dated 1st March 2012, the petitioners challenge their conviction and sentence for attempted robbery with violence following their arrest on the 4th of November 2002. They had appealed to the High Court following their conviction but their appeal was dismissed on 10th May 2007. A further appeal to the Court of Appeal was dismissed on the 14th of November 2008. They now argue that the death sentence imposed upon them was unlawful and in violation of their constitutional rights as there is a contradiction between section 297(2) and 389 of the Penal Code.
2. The petition is supported by the affidavit of **Joseph Baariu Imiemba** sworn on the 1st day of March 2012. The petitioners filed written submissions together with a list of authorities dated the 12th of June 2012.
3. The petition is opposed. Grounds of opposition together with written submissions dated the 16th of July 2012 were filed on behalf of the respondent.
4. When the matter came up for hearing on the 18th of July 2012 in the presence of Mr. Kihara holding brief for Mrs. King'oo for the petitioners and Mr. Njogu for the respondent, both parties elected to rely on their written submissions and authorities which they indicated that they would not be highlighting.

The Petitioners' Case

5. The facts as they emerge from the affidavit in support of the petition is that the petitioners are adult males of sound mind currently serving a life sentence at Kamiti Maximum Prison in Nairobi. They were arrested on the 4th day of November 2002 and charged with attempted robbery with violence contrary to section 297(2) of the Penal Code. On 26th September 2003, they were sentenced to death.
6. The petitioners aver that they appealed to the Superior Court against their conviction and sentence but their appeal was dismissed on the 10th of May 2007. A second appeal to the Court of Appeal was also unsuccessful, having been dismissed on the 14th November 2008. Their death sentence was, however,

commuted to life imprisonment by the President in exercise of the Prerogative of Mercy under section 270 of the former constitution.

7. The main contention by the petitioners is that the provisions of section 297(2) of the Penal Code, which prescribes a mandatory death sentence for the offence of attempted robbery with violence, is at variance with section 389 of the Penal Code which prescribes punishments offences.

Under this provision, the punishment for attempted robbery is a jail term not exceeding seven years.

8. They argue therefore that their conviction and sentence to death for attempted robbery with violence is a violation of their constitutional rights; that the mandatory death sentence meted out on them was excessive, arbitrary and inhuman and deprived them of the right to a fair trial contrary to Article 50 (2) of the Constitution of Kenya.

9. They contend that they have suffered inhuman and degrading punishment and have been deprived of the right to life arbitrarily in breach of Article 26 (1)(3) of the Constitution; that the law was not fully observed when convicting and sentencing them, thus denying them access to justice in breach of Article 48 of the Constitution.

10. They argue further that they are entitled to full benefit of the law as provided for under Article 27(1) by receiving a lesser sentence for the offence. They submit also that new jurisprudence has emerged that has dramatically reconciled the disparity in section 389 and 297(2) of the Penal Code and rely on the cases of **David Mwangi Mugo –v- Republic, Criminal Appeal No. 368 of 2007; Peter Odhiambo Owino –v- Republic, Criminal Appeal No. 291 of 2007; Evanson Muiruri Gichane v Republic, Criminal Appeal No. 277 of 2007; Protus Buliba Shikuku –v- Attorney General, Constitutional Reference No. 3 of 2011** and seek the following orders:

i. That the Honourable Court be pleased to grant a declaration that the constitutional rights of the petitioners have been breached by the Respondent by convicting and sentencing the petitioners to serve an unlawful sentence.

ii. A declaration that section 297(2) of the Penal Code contradicts section 389 as to the sentence for the offence of attempted robbery and goes against the letter and spirit of the Constitution of Kenya enshrined in Article 26(1) and (3) and Article 50(2) and the benefit of the contradiction should be given to the petitioners.

iii. That the Respondent be ordered to release forthwith the petitioners who have served more than 7 years forthwith.

iv. That costs be provided (sic) for in favour of the petitioners in any event.

The Respondent's Case

11. The position taken by the respondent as set out in the Grounds of Opposition is that the petition lacks clarity and precision in setting out the alleged violations; that it is a non-starter for want of full disclosure; that the contention that the petitioners were deprived of the right to a fair hearing is misconceived since the issue was never raised either in the trial court or in the two appellate courts. Finally, it was the respondent's contention that the petitioners are serving a lawful sentence provided for by the law.

12. The respondent submits that after their arrest, trial and conviction for attempted robbery with violence contrary to Section 297(2) of the Penal Code, and following their unsuccessful appeals to the High Court and the Court of Appeal, the petitioners have exhausted all their appellate rights. This marked the end of the litigation road for the petitioners in their pursuit of a reprieve against the convictions and the sentences which had been handed out to them by the lower court and confirmed by the superior court.

13. The respondent submits that the gist of the petition is the petitioners' allegation that section 297(2) of

the Penal Code prescribing mandatory death sentence for the offence of attempted robbery with violence is at variance with Section 389 of the Penal Code which prescribes that punishment for attempted offences punishable by death should be a jail term not exceeding seven years. While conceding that there may be an apparent conflict between the two sections, the respondent argues that the authorities relied on by the petitioners rightly recognize that there is an apparent conflict in the reading of the two sections, but that the court in making the determination in those authorities goes ahead to state that this conflict may only be resolved by Parliament.

14. The respondent therefore submits that the ordinary task of the court is to give full and fair effect to the penal laws which the legislature had enacted and relies on the Privy Council decision in the case of **Reyes –v- The Queen [2002]2 AC 235**.

15. The respondent contends that attempted robbery is unique in itself in that it has its own definition given in Section 297(1) of the Penal Code. A

penalty for attempted robbery is given in Section 297(2) of the Penal Code.

16. With regard to the allegation by the petitioners that their right to a hearing as provided under Article 50 had been violated, the respondent argues that this was not the case as the petitioners were never deprived the right to fair hearing as alleged; that Article 50(6) of the Constitution should be invoked specifically in circumstances where the petitioners can demonstrate there is existence of new and compelling evidence that had not been relied upon, which was not the case in this instance.

17. On the allegation that the petitioners' right to life under Article 26(3) had been violated, the respondent again contended that this was not so; that in any event the right to life was not an absolute right: one may be deprived of the right if it is authorized by the Constitution or any other written law.; and that the rights of the accused must be balanced with equally fundamental societal interests in bringing those accused of crime to stand trial and account for their actions.

18. Finally, the respondents submitted that the petitioners had not proved with particularity the particular rights which have been infringed and shown how they have been infringed. The respondent relied on the dictum of Trevelyan and Hancox, JJ, in the case of **Anarita Karimi NJeru –v- Republic [1979] KLR 154** with regard to the need for a petitioner in a constitutional reference to set out *'with a reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.'*

19. The respondent therefore urged this court to dismiss the petition.

Determination

20. The petitioners have come to this Court alleging violation of their rights under the Constitution, specifically because of the apparent contradiction between sections 297(2) and 389 of the Penal Code. They allege that their right to a hearing under Article 50 was violated, as was their right to life under Article 26(3) of the Constitution of Kenya 2010.

21. I will first address myself to the issue of the right to a hearing. It is obvious from the documents annexed to the petitioners' affidavit that they were accorded a full hearing before no less than three courts of competent jurisdiction. They were duly represented by counsel at their trial before the Magistrate's Court in Criminal Case No. 2121 of 2002 where they were convicted of attempted robbery with violence. They then appealed to the High Court sitting in Nakuru in Criminal Appeals No. 451, 452 and 454 of 2003 which appeals were dismissed. At this stage, they were again fully heard, and they had benefit of Counsel who presented their case before the two-judge appellate court. Finally, they appealed to the Court of Appeal in Criminal Appeals Nos. 87, 88 and 89 of 2007, which appeals were fully canvassed but ultimately dismissed by the Court of Appeal. At all these stages, the petitioners had an opportunity to raise the issues they have now raised in this petition before the High Court and the then highest court in the land, the Court of Appeal, but they did not.

22. Given the above facts, I must ask myself three critical questions: Under what circumstances can a Court re-open a matter, as the petitioners in this case are clearly asking this Court to do? Is it now open to the petitioners to raise the issue which they had full opportunity to raise but did not in the form of a constitutional reference? More importantly, does this Court have jurisdiction to, as it were, sit on appeal on a decision of the Court of Appeal because it is brought under the guise of a constitutional reference?

The Right to a Hearing

23. The petitioners have gone through the gamut of the appellate process available to them. They could have raised the issues they now raise before this Court in the High Court on their first appeal, or in the Court of Appeal. In effect, they are asking this Court to consider afresh the issue of their sentence. A reading of the constitutional provisions with regard to the right to a fair hearing contained at Article 50 of the Constitution indicates that the High Court has jurisdiction to re-open a matter only under the provisions of Article 50(6) which provides as follows:

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial 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. 9 Judgment: Petition No. 61 of 2012

24. In the present case, the petitioners have not invoked the provisions of Article 50(6). They are not alleging that new and compelling evidence has become available. Rather, they are asking the Court to address its mind to matters that were within the jurisdiction of the courts which heard the petitioners' appeals, and to which the point now in issue in this petition could have been addressed. They are, in effect, asking this court to, as it were, sit on appeal on the decisions of the High Court and the Court of Appeal.

Jurisdiction of the Court

25. The jurisdiction of the Constitutional and Human Rights Division was recently re-emphasised by this Court in a petition in which the petitioner was asking the court to 'amend' or 'correct' an order of another Division of the High Court.

26. In the case of **Philip Kipchirchir Moi-v- The Hon. Attorney General & Another Petition No.65 of 2012**, Lenaola J, in dismissing the petition, observed at paragraph 15 and 16 of his decision as follows:

I am wholly guided and I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division

that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.

When a controversy of a similar nature arose in the case of Peter Ng'ang'a Muiruri vs. Credit Bank Ltd & 2 others [2008] eKLR, the Court of Appeal firmly held as follows;

"There is no provision in the Constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the Constitution which donate the power to the High Court to deal with questions of interpretation of Sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.

With regard to the protective provisions, Section 84 of the Constitution does not in any of its subsections talk about the Constitutional Court. Instead it talks about an Application being made to the High Court. 11 Judgment: Petition No. 61 of 2012

In view of what we have stated above, it is quite clear that Nyamu, J.'s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a Court called the Constitutional Court with supervisory powers over all other Courts. The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional Court as opposed to creating a Division of the High Court. Any single judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a constitutional Division was established did not by such establishment create a Court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. ...'

27. The petitioners have referred the court to the cases of **David Mwangi Mugo –v- Republic, Criminal Appeal No. 368 of 2007; Peter Odhiambo Owino –v- Republic, Criminal Appeal No. 291 of 2007; Evanson Muiruri Gichane v Republic, Criminal Appeal No. 277 of 2007; Protus Buliba Shikuku –v- Attorney General, Constitutional Reference No. 3 of 2011**. In the cases of **David Mwangi Mugo –v- Republic, and Evanson Muiruri Gichane –v- Republic** (supra) that were before the Court of Appeal, the Court rightly exercised its appellate jurisdiction in dealing with the issue of the sentence meted out on the appellant(s) before it as the issue had been raised as a ground of appeal. In **Peter Odhiambo Owino –v- Republic** (supra) the Court of Appeal, again in exercise of its appellate jurisdiction, found that the evidence did not disclose the offence of attempted robbery with violence but did disclose two minor offences the sentences for which the appellant had already served.

28. I wholly agree with the views expressed by Lenaola J, and defer to the sentiments of the Court of Appeal in the Peter Ng'ang'a Muiruri case.

29. In the case of **Protus Buliba Shikuku –v- Attorney General, Constitutional Reference No. 3 of 2011**, however, and with due respect to my sisters sitting in Kisumu who determined that matter, I am of the view that the Court had no jurisdiction to determine the matter as it did. The court relied in that case, among others, on the decision of Nyamu, J in the case of **Labhsons Limited -v- Manula Hauliers Milimani HCCC No. 204 of 2003** in finding that it had jurisdiction to entertain the petition

and issue the orders that it did. The position taken by Nyamu J in that case and in others regarding the jurisdiction of the High Court sitting as a constitutional court was the subject of much criticism by the Court of Appeal in the case of **Peter Ng'ang'a Muiruri -v- Credit Bank Ltd & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** which is set out at length in the decision of Lenaola J in the **Philip Kipchirchir Moi** case cited above. It would be to arrogate to itself jurisdiction which it does not have for this Court to purport to entertain this petition and to grant the orders prayed for.

30. In the circumstances I find and hold that this Court does not have the jurisdiction to embark on an examination of the provisions of the Penal Code that form the basis of this petition, or to issue the orders prayed for. The petition is therefore dismissed with no order as to costs.

Dated, Delivered and Signed at Nairobi this 27th day of September 2012

**MUMBI NGUGI
JUDGE**