



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 158 of 2012

JOHN IRUNGU MACHARIA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner is a prisoner serving a life sentence at the Kamiti Prison. He has brought this petition on his own and he appeared in court on 6<sup>th</sup> November 2011 to prosecute it.
2. The petitioner was arrested on 12<sup>th</sup> March 2005 on suspicion of having committed the offence of murder. He was arraigned in court in July 2005 for the offence of murder. After trial, he was convicted and sentenced to death on 22<sup>nd</sup> January 2008 in *Nairobi High Court Criminal Case No. 69 of 2005*. His appeal to the Court of Appeal, *Criminal Appeal No. 23 of 2008* was heard and on 26<sup>th</sup> February 2010, the appeal was dismissed.
3. According to the petition, the complaints are as follows;
  - (a) *The petitioner's rights were violated as he was sentenced to death despite being a first offender.*
  - (b) *The maximum death sentence meted to him was harsh, excessive and inhuman and calls for intervention of the court in accordance with the case of **Godfrey Ngotho v R**.*
  - (c) *The petitioner also complains that his rights were violated when he was arrested in March 2005, kept in custody and charged July 2005 beyond the time permitted by the Constitution.*
4. Although the respondent did not file any affidavits or documents in response, Mr Njogu, counsel or the respondents, submitted that petition did not set out any breaches or violations of the petitioner's rights and that the issues raised by the petitioner had been settled by the legal precedent. Counsel urged the court to dismiss the petition.
5. The petitioner has exercised the legal options available to him to challenge his conviction. He was tried and his appeal was declined. **Article 50(6)** which allows the re-opening of criminal proceedings is not applicable in this case as there is no new and compelling evidence (See *Wilson Thirimba Mwangi v Director of Public Prosecutions Nairobi Petition No. 271 of 2011 (Unreported)*). Furthermore, the Constitution cannot be relied upon as the matters complained of and the Court of Appeal judgment delivered on 26<sup>th</sup> February 2010 occurred before the effective date of the Constitution. It is now

established that the Constitution is not retrospective and the petitioner cannot thus avail himself of the right to re-open his case under the Constitution (See ***Samuel Kamau Macharia and Another v Kenya Commercial Bank and Others Supreme Court Application No. 2 of 2011 (Unreported)***).

6. This petitioner's case must also be dismissed on the ground that any errors in the trial ought to have been raised at the trial itself or an appeal from the conviction. This court cannot entertain a collateral challenge to the two judgments. This issue was dealt with by the Court of Appeal in ***Methodist Church in Kenya Trustees v Reverend Jeremiah Muku and Another Nyeri Civil Appeal No. 233 of 2008 (Unreported)***.

7. The petitioner has cited the case of ***Godfrey Ngotho v Republic Mombasa Criminal Appeal No. 17 of 2008 (Unreported)*** delivered on 30<sup>th</sup> July 2010 as authority to review his sentence. The Court of Appeal held that the mandatory death penalty was unconstitutional. The petitioner argues that the sentence is oppressive, inordinate, inhuman and unreasonable and he is therefore entitled to review of the sentence.

8. The parties concede that His Excellency, the President of the Republic of Kenya did on 3<sup>rd</sup> August 2009 commute all the death sentences to life sentences. In the circumstances, I think it is not necessary to address whether the death sentence was oppressive, inordinate, inhuman, unreasonable and incapable of sound explanation.

9. In the whole therefore, the petition is dismissed. There shall be no order as to costs.

**DATED and DELIVERED at NAIROBI** this 4<sup>th</sup> day of December 2012

**D.S. MAJANJA**  
**JUDGE**

Petitioner in person.

Mr Njogu, State Counsel, instructed by the Director of Public Prosecution for the respondent.