



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Republic (Criminal Revision 183 of 2023)
[2023] KEHC 20556 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL REVISION 183 OF 2023**

REA OUGO, J

JULY 11, 2023

BETWEEN

WYCLIFF MUMEME NYONGESA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Wycliff Mumeme Nyongesa (the applicant) has filed a notice of motion dated February 9, 2023 under article 47 (1), 50 (2) (b), (n) (i) & (ii) of the Constitution 2010, section 134, 362, 364 and 367 of the Criminal Procedure Code cap 75 Laws of Kenya . The applicant seeks the following orders;
 - i. That the honorable court be pleased to call and examine the record and/or proceedings in criminal case No E1033 of 2022.
 - ii. That the honorable court do stay the proceedings in criminal case No E 1033 of 2022 which is salted for hearing pending hearing and determination of the application and or review.
 - iii. That the honourable court to make any further orders as it deems fit and expedient
 - iv. That costs of the application be provided.
2. The application is supported by 7 grounds on the face of the application and a supporting affidavit by the applicant. The application was opposed. Parties canvassed the application by way of written submissions.
3. Prayer 2 was granted in the interim pending the hearing of the application interpartes.
4. In his affidavit dated February 9, 2023 the applicants depones as follows; on the September 15, 2022 he was charged before the Chief Magistrates Court *vide* criminal case No E 1033 of 2022 with the offence of robbery with violence contrary to section 296 of the Penal Code alongside other offences.



That his advocate on perusing the charge sheet advised him that the offence of robbery with violence does not exist. His counsel raised a preliminary objection dated the October 27, 2022 asking the court to strike out and/or dismiss the charge of robbery with violence contrary to section 296 of the Penal Code. That his objection to the charge of robbery with violence stems from the pronouncement of the constitutional court in Joseph Kaberi & others v the AG wherein the court unequivocally declared that section 296 of the Penal Code failed to satisfy the constitutional threshold regarding the requirement for clarity in definition of the nature and scope of the offence of robbery with violence that would enable an accused person to properly prepare his defence. That the constitutional court further directed that the AG to move with speed to amend section 296 of the Penal Code amongst other sections with a view of aligning the same with the Constitution of Kenya 2010 within 18 months from the date of pronouncement of the said judgment. That at the time he was charged with robbery with violence the impugned section 29 of the Penal Code had not been amended. That the trial court disregarded the law by failing to appreciate the unambiguous interpretation of section 296 of the Penal Code and its universal application by arriving at a narrow and restrictive finding that the constitutional court never recognized him as a beneficiary of the judgment and therefore he was not in the category of persons who could apply to the court for relief if aggrieved by the charges preferred against him. That the constitutional court sought a progress report from the AG to be made in the ongoing cases that were filed before the judgment was delivered in order to confirm the extent of compliance with its orders. That an illegality and travesty of justice has been committed which will continue to be committed by the trial court to his detriment since the hearing of the criminal case No E1033 of 2022 is slated for hearing.

5. I have read and considered the written submissions by the parties. The applicant submitted as follows; that the constitutional court in discharging its constitutional mandate unequivocally held that section 296 of the Penal Code was ambiguous and when tested against the newly promulgated 2010 Constitution was found wanting. That with the said finding it was no longer open to the trial court to purport to re-interpret the aforesaid section and arrive at a contrary finding to wit that section 296 of the Penal Code is sufficiently clear to make the applicant aware of the charge preferred against him. That section 296 of the Penal Code remains condemned as the decision has not been overturned on appeal nor have the highlighted deficiencies cured through amendment as directed by the court. That the trial court acted beyond its jurisdiction in re-interpreting section 296 of the Penal Code, thus the court acted illegally since it acted beyond its jurisdiction but also contravened the doctrine of stare decisis. The applicant urged this court to apply section 362 of the Criminal Procedure Code to call and examine the record of proceedings for the purpose of satisfying itself regarding the correctness, legality or propriety of any findings, sentence or order recorded or passed and as to the regularity of the proceedings of the subordinate court. That an illegality was committed by the trial court when it required the applicant to take plea in relation to any offence that is not defined in law contrary to the provisions of article 50 (2), (b) (n) (i) & (ii) of the Constitution. The applicant seeks that his preliminary objection dated October 27, 2022 be allowed.
6. The respondent submitted as follows that ; the trial court dismissed the objection and noted that it was not a constitutional court and that it had no jurisdiction to hear and determine the matters of violation of fundamental rights and freedoms. That the finding by the court was proper in law. There is no impropriety or irregularity in the proceedings before the subordinate court and therefore the trial court's decision should not be set aside. That the charge of robbery with violence does not offend the constitution. That the case of Joseph Kaberia Kabinga & 11 others v AG petition No 616 of 2010, [2016] eKLR which the applicant seeks to rely on did not declare the section unconstitutional as it would have done so expressly. That the court gave suggestions on how the charges could be drafted and the court allowed cases of robbery with violence already pending before the subordinate courts to proceed



to their conclusion. That the convictions against the petitioners in the Joseph Kaberia's case were not set aside and that the charge of robbery with violence is a valid charge. That the court should set aside the stay order and allow the trial to proceed before the subordinate court.

Determination.

7. I have considered the application dated the February 9, 2023, the affidavit in support and the written submissions filed by the parties. The applicant has requested this court to call and examine the record and proceedings in criminal case No E1033 of 2022. Pending *inter-partes* hearing of this application this court stayed the said proceedings.
8. I have perused the said proceedings. The proceedings in criminal case No E1033 of 2022 show that the applicant has been charged with 3 offences; the 1st count of robbery with violence is the charge he has issues with. He raised a preliminary objection before the subordinate court and the court dismissed his objection. The court ruled as follows;
 - ‘ 7. Section 296 (2) , Penal Code makes stipulations where a robbery is committed when the offender is armed with a dangerous and offensive weapon.
 8. In so far as count No 1 is concerned, this court finds that the same is clear , was clearly read to the accused and the accused has been made aware of what he was charged with.
 9. In line with the submissions that it contradicts the provisions laid down in the Constitution of Kenya, 2010, this court notes that it is not a constitutional court and that it has no jurisdiction to make such declarations as sought herein.
 10. That court analysed the cited and annexed authority of *Joseph Kaberia Kabinga*, Supra), the Attorney General was granted 18 months to make a report to that court regarding the declarations made on those sections.
 11. The petitioners were granted liberty to make any further applications to the court regarding the same.
 12. At no point did that court declare any subsequent charges lodged under the said sections to be null and void and to be struck out.
 13. In the absence of such an express declaration and with no report shown to the court of the outcome beyond the 18th months granted therein, such a declaration is beyond the preview jurisdiction of this court
 14. With regard to the *Kipkurui Arp Sigalai Case* (supra), the principles of the law governing charge sheets , stated therein have not been offended in the instant case.
 9. I have examined the record of the subordinate court. The charges were properly read and explained to the applicant and he pleaded not guilty to each charge. Thereafter the applicant's counsel raised the preliminary objection and the same was heard and a ruling given.
9. In my view the proceedings were not irregular to warrant a review. The trial court noted that the charge stipulates where a robbery is committed when the offender is armed with a dangerous and offensive weapon. The trial court clearly indicated that it had not jurisdiction to make the declaration sought and that the court did not make a declaration that any subsequent charges lodged under the said sections to be null and void. This was the trial court's understanding of the said decision. In my view she cannot be faulted for her decision .



10. I have read the said decision of *Joseph Kebaria & 11 others v AG* (supra) and in my view the court did not declare section 296 (2) to be unconstitutional. The law still stands. The court noted that there an issue with the sufficient precision, distinctively clarifying and differentiating the degree of aggravation of the offence of robbery and attempted robbery. The Attorney General was given some directions which he has not acted upon. Does this mean that the sections are unconstitutional, my view they are not. If the constitutional court wanted to make such a bold declaration that the said sections were unconstitutional and should apply to all charges of robbery with violence, it could have done so and even mentioned the matter after the period given. In my view the law remains as is until such time that the said court is moved to make a final declaration on the issues related to the sections that were challenged by the petitioner or a declaration that the subsequent charges under section 295,296 and 297 are unconstitutional.
11. The charge before the subordinate court in count No 1, is one of robbery with violence contrary to section 296(20) of the *Penal Code*. The particulars of the charge are that, “On the July 14, 2022 at about 0300 hours at Matumbufu area of Bungoma sub-county within Bungoma county, while armed with dangerous weapons namely a panga, robbed Meshack Wanjala cash Kshs 2000/- a pair of shoes worth Kshs 3000/- and a bunch of keys and during the said robbery, chopped the fingers of on both hands of Meshack Wanjala.
12. The charge clear and I find it not to be ambiguous or defective. The proceedings were proper, legal and regular. The application is dismissed and the stay order is vacated. The lower court to proceed with the hearing and determination of the criminal case No, E1033 of 2022. No orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH JULY 2023.

R.E.OUGO

JUDGE

In the presence of;

Mr. Lukorito For the Applicant- online

Wycliff Mumeme Nyongesa - Present

Mr. Ayekha For the Respondent

Wilkister / Okwaro C/A

