REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 468 OF 2018

MUHUMAD ABDULAHI GUDAH.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner herein filed the petition dated 24th December, 2018 through which he prays for the following reliefs:-

a. A declaration that section 166 of the Criminal Procedure Code is unconstitutional;

b. A declaration that the indeterminate holding of the Petitioner-mental patient in prison is violation of rights and unconstitutional;

c. A declaration that the Petitioner's rights as provided for under the Constitution have been violated and the continued holding of the Petitioner in prison is illegal and unlawful;

d. A declaration that the Petitioner's rights guaranteed under Article 28 have been grossly violated;

e. An order that the Petitioner be either released forthwith or transferred to a hospital;

f. Costs of the suit.

2. The Petitioner's case is that on 14th November, 2013 he was convicted of murder by the High Court at Garissa. The Court, however, found that he was suffering from a disease affecting the mind at the time of committing the murder and was therefore incapable of understanding what he was doing. Consequently, the Court acting in accordance with Section 166(1) of the Criminal Procedure Code (CPC) made a finding that he would be detained in custody at the pleasure of the President of the Republic of Kenya. He was thereafter held in prison detention instead of a hospital. This the Petitioner asserts, was unconstitutional and infringed his constitutional rights and freedoms under Articles 22, 25, 28, 29, 50, 54, 160(1), and 165(3)(i) & (ii) of the Constitution.

3. The Petitioner further alleges that the detention order issued under Section 167(1) of the Criminal Procedure Code (CPC) was not sent to or subjected to confirmation by the High Court. The Petitioner asserts that the mandatory requirement of sending the order to the High Court was not complied with.

4. The 1st Respondent filed grounds of opposition dated 17th June, 2019 asserting that the Petitioner has failed to show how the 1st Respondent has violated his constitutional rights. It is stated that the Petitioner has not produced any evidence to support his allegations. The 1st Respondent further contends that the petition has no factual basis that raises any constitutional issues, lacks merit, is frivolous, and an abuse of the court process.

5. The 1st Respondent filed written submission dated 28th April, 2020 in which it is submitted that the Petitioner, a mentally ill person, does not have the capacity to file a suit on their own behalf and ought to have sued through a next friend. This statement is supported by reference

to the decision in the case of **Mbugua Ikiga v Peter M. Mbugua & 2 others [2014] eKLR.**

6. I address the 1st Respondent's concern as follows. The Petitioner herein was adjudged of unsound mind in **Garissa High Court Criminal Case No 19 of 2012; Republic v Muhumud Abdullahi Guhad** and therefore found not to be criminally responsible for the murder as he was not aware of what he was doing at the time of the commission of the offence. However, it should be remembered that the Petitioner was treated and eventually found fit to stand trial. Section 11 of the Penal Code provides for the doctrine of the presumption of sanity as follows:-

> **"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."**

7. The Petitioner has himself averred that he is of sound mind. The 1st Respondent cannot therefore be allowed to cast aspersions on the Petitioner's sanity without adducing any evidence in support of such an allegation. I therefore do not find any merit in the 1st Respondent's claim that the Petitioner had no capacity to file this petition.

8. The Petitioner in his submission filed on 1st July, 2019 relies on the decision in **Criminal Case No. 6 of 2012 Republic v S.O.M.** as well as the decision in **A.O.O. & 6 others v Attorney General & another Nairobi Petition No. 570 of 2015**, to assert that the pre-determined sentence of incarcerating him at the President's pleasure breaches the doctrine of separation of powers and the right to a fair trial under Article 50(2) of the Constitution as it denies the trial judge discretion in sentencing.

9. The Petitioner contends that he has a right to be treated with dignity as a mental patient and should not be subjected to cruel, inhuman, and degrading treatment by being detained in prison. He cites the decision in **Meru High Court Criminal Appeal No. 59 of 2014**, **Hassan Hussein Yusuf v Republic** where it was held that detention of persons suffering from mental disabilities at the pleasure of the President is unconstitutional and violates Articles 25 and 29 of the Constitution.

10. The Petitioner submits that the family of the victim had accepted that he murdered the victim when he was insane. He claims that the two families had engaged in a traditional dispute resolution mechanism through which his family paid blood money of one hundred camels to the victim's family.

11. The Petitioner argues that in accordance with sections 216 and 329 of the CPC, mitigation is part of the trial process and the trial Court should have called for a pre-sentencing report. He contends that this was not done and the trial Court instead transferred his sentencing to the executive by ordering that he be detained at the President's pleasure. He asserts that he was denied the opportunity to mitigate and inform the trial Court of the payment of the blood money. Reliance is placed on the case of **Francis Muruatetu (supra)** for the proposition that mitigation is an important element of a fair trial.

12. In response, the 1st Respondent submits that the Petitioner's detention in prison from 14th November, 2013 was in accordance with the law as laid out in Section 166(3) &(4) of the CPC. It is further submitted that the Petitioner has failed to demonstrate how his detention in prison has limited his right to freedom from torture and and subjected him to cruel, inhuman, or degrading treatment or punishment. Reliance is placed on the case of **Anarita Karimi Njeru v Attorney General [1979] KLR 154** in support of the submission that the Petitioner has failed to meet the threshold for grant of constitutional reliefs.

13. The 2nd Respondent filed undated submissions on 10th March, 2020 and concurred with the Petitioner on the import of the decisions in the cases of **Republic v S.O.M. (supra); A.O.O. & 6 others v AG (supra);** and **Francis Karioko Muruatetu & another v Republic, Petition No. 15 & 16.**

14. The 2nd Respondent also agrees with the Petitioner that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person, and failing to do so renders the trial unfair and conflicts with Articles 25(c), 28, 48, and 50(1) and (2)(q) of the Constitution.

15. The 2nd Respondent, however, disagrees with the Petitioner's suggestion that the resolution of the dispute through payment of blood money should lead to his release. According to the 2nd Respondent, such a mechanism is repugnant to justice and morality.

16. The 2nd Respondent further contends that since the Petitioner has not challenged his conviction, his claim for damages should not be entertained. It is further asserted that the award of damages is a civil claim and requires a separate and distinct hearing.

17. A perusal of the Petitioner's case and submissions clearly shows that he has presented an appeal to this Court in the guise of a constitutional petition. The power to hear appeals from the High Court is reserved for the Court of Appeal by Article 164(3)(a) of the Constitution. This Court has no jurisdiction to critique the judgement of a Judge of the High Court in the pretext of exercising its jurisdiction under Article 165 of the Constitution. Indeed Clause 6 of Article 165 expressly denies this Court supervisory jurisdiction over a superior court by stating that:-

> **"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."**

18. The Petitioner has not approached the Court under Article 50(6) of the Constitution. I, however, doubt if he could have met the threshold for seeking a new trial under that provision which provides that:-

> **"50. (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."

19. In my view, what the Petitioner has presented to this Court requires the formulation of a policy by the respondents who appear to agree with the Petitioner on the indeterminate nature of his incarceration. I suspect that there are other prisoners in similar situation with the Petitioner.

20. The best approach is for the respondents to look for a constitutional solution instead of supporting the Petitioner's attempt to persuade this Court to exercise a jurisdiction it does not have. Without jurisdiction, I cannot provide a solution to the Petitioner. As such, I find the instant petition without merit and dismiss it with no order as to costs.

Dated, signed and delivered through video conferencing/email at Nairobi this 16th day of July, 2018.

W. Korir,

Judge of the High Court