



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 97 & 98 OF 2014

COLLINS OGONYO ONDITI.....1ST PETITIONER

GEORGE OMONDI MHENDA.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Constitutional Petitions Nos. 97 and 98, both of 2014 (now consolidated) arise from proceedings that commenced from the subordinate court in the first instance and went all the way to the court of Appeal.

2. Before the subordinate court, the Petitioners jointly with another were charged with three counts of robbery with violence contrary to section 296 (2) of the Penal Code vide Mombasa Criminal Case No 2805 of 2008.

“On the 21st day of March 2008 at Nyali estate in Mombasa District within Coast Province, the jointly with others not before court while armed with dangerous weapons namely pistols robbed HASSAN YUNUS MADORBE of a Somali sword, National identity card and a bunch of keys all valued at Ksh 500/= and at or immediately before or immediately after the time of such robbed threatened to use actual violence to the said HASSAN YUNUS MADORBE”.

“On 21st day of March 2008 at Nyali estate in Mombasa District within coast Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed HASSAN UNUS MAKORBE of a Somali sword, National identify card and a bunch of keys valued at Ksh 500 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the aid HASSAN YUNUS MADORBE”.

On the 3rd day of September 2008 along Nkrumah Road in Mombasa District within Coast Province, otherwise than in the course of stealing dishonestly received Nokia mobile phone model N 95 serial number 354 835 013 971 792 knowing or having reason to believe it to be a stolen property.

3. The trial before the subordinate court proceeded for hearing culminating into a conviction whereby the petitioners, upon being found guilty were sentenced to death on 28th January, 2010.

4. The petitioners then appealed to the High court against the conviction and sentence vide High Court Criminal Appeal No. 43 of 2010 citing the following grounds;

(a) That the confession was inadmissible as it was made to a police officer who was below the rank of an inspector as provided for by the law.

(b) That there was non-disclosure of material evidence by the Respondent during pre-trial.

(c) That the identification parade was irregular as the incident was reported a Nyali police station while the parade was conducted a Central police station outside the jurisdiction within which the offence was committed.

(d) That there was misdirection by the trial court in admission of documents from Safaricom;

(e) That the proceedings in the trial court were a nullity as the court allowed the testimony of Pw3 who was present when Pw2 testified.

(f) That the respondent failed to charge all the persons who were found in possession of the stolen phones;

(g) That the death sentence was unlawful.

5. The High Court rendered itself on the proceedings of the subordinate court and upheld the conviction and sentence by the trial magistrate and dismissed the appeal in its entirety in a judgment delivered on 18th September, 2018

6. Again, the Petitioners still dissatisfied with the judgment of the High court moved to the court of Appeal vide Criminal Appeal No. 28 of 2013 and cited the following grounds;

(1) That the learned hon. Trial magistrate erred in law and fact in convicting me in reliance of visual identification evidence tendered by Pw1, Pw2, Pw3 and Pw4 without proper finding the same was flawed when given that;

(i) the attack occurred at night and the source of light which illuminate that area was not brought within measurable margins as to be safely depended for fear and error free identification.

(ii) The attackers were strangers, the attack was sudden and brief and the sheer presence of pistol must have caused fear, panic and threat which must have anticipated their ability for proper identification.

(iii) They never gave descriptions in their initial report police therefore mounting of and identification parade could obviously serve no proper purpose.

(2) That the learned hon. trial magistrate erred in law and fact in connecting my arrest with the matter in question without proper finding the same had no link when given other facts that;

(i) I was arrested with noting in criminative to link me with this case

(ii) the person who led police to my arrest was left out of the prosecution case.

(3) that the learned hon. Trial magistrate erred in law and fact in failing to see that the prosecution case was not sufficiently investigated and even the police released one of the most essential suspect of who they knew had links with a phone which is alleged to be one of the stolen items.

(4) that the learned hon. Trial magistrate erred in law and fact when he failed to consider that the charge sheets as drafted were fatal to consider and incurably defective for the evidence in record goes against the information tendered in court in its support thus contravening section 134 of the CPC prosecution case was governed by many contradictions and more particularly concerning the role played by the suspect at the scene of crime.

(5) That the learned hon. Trial magistrate erred in law and fact by convicting me without seeing that section 109 of the evidence act was not adhered to and also the section used by the trial court to convict me was wrong.

(6) That the learned hon. Trial magistrate erred in law and fact inadequately rejecting my defence statement without giving any cogent reason.

7. The appeal was heard and dismissed in a judgment rendered on 5th June, 2014 whereby the sentence of the trial court was upheld.

8. The 1st Petitioner, COLLINS OGONYO ONDITI, filed a Miscellaneous Criminal Application No. 97 of 2014 while the 2nd petitioner, GEORGE OMONDI MIHENDA filed miscellaneous Criminal Application No. 98 of 2014. The two Miscellaneous Criminal Applications were consolidated on 10th November, 2014.

9. In their petitions, brought under the provisions of Articles 21 (1) and (5), Article 22(1) and (3); Article 23(1) and (3); Article 25, Article 26 (1) and (2); Article 27, 28, 47, 48, 50 (1), (2) (4) and (6); Article 165(3) and Article 258 (1) of the constitution, 2010, the Petitioners have raised the following grounds;

(a) That the confession was inadmissible as it was made to a police officer who was below the rank of an inspector as provided for by the law.

(b) That there was non-disclosure of material evidence by the Respondent during pre-trial.

(c) That the identification parade was irregular as the incident was reported at Nyali police station while the parade was conducted at Central police station outside the jurisdiction within which the offence was committed.

(d) That there was misdirection by the trial court in admission of documents from Safaricom.

(e) That the proceedings in the trial court were a nullity as the court allowed the testimony of Pw3 who was present when Pw2 testified.

(f) That the respondent failed to charge all the persons who were found in possession of the stolen phones.

(g) That the death sentence was unlawful.

10. In these grounds, the petitioners have given an account from the evidence before the trial court which they perceive as grave omissions which were not dealt with by the trial court and the Appellate court in the matter.

11. According to the Petitioners, their rights under Article 50 (2) (p) of the Constitution 2010, were violated. The reason I had the grounds upon which the petitioner appealed to the appellate courts was so as to identify what was decided at the trial in both instances and whether the issues they raised were dealt with lawfully. The conclusion of this will help determine the parameters of applying Article 50(2) (p) and 6(a) and (b) of the Constitution. Of worth noting is that both petitioners did not challenge their sentences in their respective grounds of petitions.

SUBMISSIONS BY PETITIONERS

12. The 1st petitioner submitted that his rights to fair trial were violated. He stated that during trial, the trial magistrate did not give him sufficient time to prepare for his defence as he was not supplied with the necessary documentary exhibits within reasonable time, which amounted to an ambush. This is the main point he gave emphasis to in his submissions and cited several authorities in support of this.

13. The 2nd petitioner submitted that his rights were violated in that he was given exhibits late and hence lacked adequate time to prepare for his defence. He further claimed that his spirited mitigation was ignored, hence the death sentence.

14. Both petitioners also asserted that the Honorable court has jurisdiction to determine the matter.

15. The Respondent through the learned state counsel in their submissions opposed the jurisdiction of the court and gave a reasonable argument for the same. He argued that the matters that the petitioners have relied on do not meet the standard threshold under Article 50(6) of the Constitution, 2010.

16. He however, concedes that the matter be referred back to the magistrate's court, being the trial court in view of the Supreme Court decision in the **Muruatetu case**, on the interpretation of section 296(2) of the Penal code, which makes the death sentence as a penalty hereof mandatory. This has become discretionary by virtue of Article 50 (2) (p) of the Constitution of Kenya, 2010.

17. Article 50 (2) (p) of the Constitution, 2010 provides as follows;

“ Every accused person has the right to a fair trial which includes the right;-

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has change between the time that the offence was committed and the time of sentencing and

18. Article 50(6) provides;

“ A person who is convicted of a criminal offence may petition the High court for a new trial if ;-

(a) the person appears, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appear within the time allowed’ and ‘

(b) New and compelling evidence has become available”

19. With the concession by the learned state counsel to have the matter re- heard for Purposes of sentencing, by the trial court, owing to the opinion of the Supreme Court in the case of FRANCIS KARIUKI MURUATETU & ANOTHER VRS R (2017) e KLR I find no need to labour on the issue of the contested sentencing.

20. The only issue for determination is whether this Honourable court has jurisdiction to rehear and determine a criminal case whose appeal has been heard and determined by the court of appeal or to re-hear the trial and re-determine any part, of it, any finding of fact or finding of law, final decision, its 1st appeal, and 2nd appeal in its capacity as constitutional court.

21. Under Article 165(3) of the Constitution of Kenya, 2010, the High court is conferred unlimited original jurisdiction in civil and criminal matters while Article 165 (6) it is conferred supervisory jurisdiction upon the subordinate courts, over any person, body or authority exercising judicial or quasi-judicial function but not over superior courts.

22. The Judicature Act expands this jurisdiction and enables it to assume authority as the court in the course on certain specified matters.

23. Under Article 165 (5) of the Constitution, the power of the High court is limited only to prevent it from diminishing the role of

specialized bodies or Tribunals.

24. At Article 50 (6) (a) and (b), the constitution gives the High court special jurisdiction whereby it has power to entertain a matter adjudicated upon by the superior court, the High court itself and the subordinate court. Under this Article, the court has jurisdiction to entertain a petition under the following circumstances; where

(a) a person convicted can petition for a new trial if his appeal has been dismissed by the court of appeal;

(b) the person realizes that he ought to have appealed on a certain matter which he now wishes the court to determine, in other word one can change his mind and refuse to resign to fate and try a chance as in a lottery”

(c) new and compelling evidence has become available and desires that this evidence be tested.

In all these circumstances, a Petitioner is required to place before the court material that support any of the requirements outlined above.

25. In the instant case, the Petitioners, complained that they were denied their rights to fair trial or furnished with documentary evidence late in the day or not given adequate time to prepare their defence, indeed, under Article 50 of the Constitution, these are constitutional rights that an accused is meant to be accorded during his/her trial. However, they needed to show that these are issues which did not feature or arise in the various stages of court trial and were never addressed by the courts, hence the dismissal of their appeals

26. At the subordinate court level, the courts are treated to hearing of evidence and observation of witnesses and the accused person to be able to determine their demeanor. At the superior court level, the court relies on the record from the trial court and have no benefit of hearing or observing the demeanor of the parties before it; unless there is an application for new or fresh evidence to be adduced. Therefore, a complaint under Article 50 (2) (p) of the constitution is not meant to aim at faulting the superior court but rather to bring out the fact that there was the original omission of facts which has caused a miscarriage of justice.

27. The other point is for a party to point out that there was an oversight, hence did not file an appeal or was under some disability that caused the failure to file an appeal. Lastly, that the material in the possession of the party at this stage was not available to him or her at the time of trial, so that if considered, may affect the outcome of the case and address the course of justice.

28. The prayer that a party needs to seek is a new trial and no other. And by so doing, this does not affect the sentence which the petitioner is already serving.

29. I have read through the grounds set out by both petitioners, the record of their trial before the lower court, their submissions before High court and court of appeal the law and cited authorities. I find that the content of their petition does not meet the standards set out under Article 50 (6) to warrant a fresh trial.

30. However, since the learned state counsel conceded to a sentence rehearing, I have considered the opinion of the Supreme Court on the application of the discretion of a court under section 296 (2) of the Penal Code and order that this matter be referred to the subordinate court to hear the petitioners mitigation on a fresh and be guided in the resentencing in view of the changed legal standards.

31. It is therefore ordered that the matter be placed before the Chief Magistrate, Mombasa Law courts for directions in terms of the above findings.

Judgment delivered, dated and signed the 2nd day of May, 2019.

LADY JUSTICE D. O. CHEPKWONY

In the presence of

N/s Ocholla, counsel for the state

Mr Mushelle counsel for the 1st Petitioner

M/s Mwanzia, counsel holding brief for Mr Obura for 2nd Petitioner

C/clerk- Beja