



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 112 OF 2018**

**IN THE MATTER OF: BREACH OF FUNDAMENTAL RIGHTS AS PROVIDED FOR UNDER THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLES 22(1) (3), 23(1)(3), 27, 47, 48,50(2) AND 165(3) (a) OF THE CONSTITUTION OF KENYA 2010 AND RULES 10-12 OF THE CONSTITUTION OF KENYA (SUPERVISORY OF FUNDAMENTAL RIGHTS AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**TOM OCHIENG WAYUMBA.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT**

1. The Petitioner was charged and convicted of attempted Robbery with violence contrary to Section 297 (2) of the Penal Code in Criminal Case No. 1005 of 2006 and sentenced to death by the Chief Magistrate's court. The Petitioner subsequently lodged a first appeal before the High Court and a second appeal in the Court of Appeal. Both appeals were dismissed and as it stands the Petitioner is serving a life sentence after his death sentence was commuted.
2. The Petitioner states that due to the mandatory nature of Section 297(2) of the Penal Code, he was sentenced to suffer death without considering the mitigating circumstances and or factors of the alleged offence.
3. The Petitioner now claims that Section 297(2), under which he was charged contradicts Section 389 of the Penal Code as to the sentence that should be meted out for the offence of attempted robbery with violence and in turn violates Article 26(2) of the Constitution.

**Response**

4. The Respondent opposed the Petition by filing a Grounds of Opposition dated 22<sup>nd</sup> January, 2019. The Respondent contends that the Court lacks the Jurisdiction to re-hear and re-determine a criminal case whose Appeal has been determined and further that Article 165(4) of the Constitution provides that Appeals from the Court of Appeal shall lie at the Supreme Court and that Article 165(3) of the Constitution gives the Supreme Court jurisdiction to hear any questions respecting the interpretation of the Constitution including whether any law is inconsistent with or is in contravention of the Constitution.
5. Further, the Respondent claims that there will be an endless cycle of litigation in the event the constitutional Court revisits the decision of the Court of Appeal as any aggrieved party in this matter will Appeal to the Court of Appeal. Further the Respondent avers that this Petition contravenes Article 50(6) of the Constitution as the Applicant has failed to show that there is new and compelling evidence which became available after his conviction.

**Submissions**

6. The Petitioner filed his Submissions on 5<sup>th</sup> September, 2018. The Petitioner submitted that he was charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code, and sentenced to death. That Section 297 (2) of the Penal Code contradicts Section 389 of the Penal Code which provides a sentence of seven years for an attempt to commit a felony.

7. The Petitioner submitted that Section 297(2) has no primacy over Section 389 of the Penal Code and as such he is entitled to benefit from the general sentence provided for under Section 389 of the Penal Code as opposed to the death sentence prescribed herein.

8. The Petitioner further submitted that all courts through which he was before, never gave him an opportunity to address the issue of non-proportionality and inappropriateness of a death penalty for an attempted offence and that he had served a sentence in excess of seven years as prescribed in Section 389 of the Penal Code, and hence has served unlawful sentence.

9. The Respondent did not file submissions.

### **The Determination**

10. Having carefully considered the Petition, the following issues arise for determination:

- a) Whether this court has the jurisdiction to entertain this Petition.
- b) Whether there is a conflict between Section 297 (2) and 389 of the Penal Code.
- c) If there is a conflict, whether the conflict infringes on the petitioner's fundamental rights and freedoms under the Bill of Rights.
- d) What orders should be granted.

*a) Whether this court has the jurisdiction to entertain this Petition*

11. The Petitioner contended that by virtue of Article 23(1) & (3) of the Constitution this Court has the jurisdiction to deal with this matter. The Respondent, on its part, argued that the Court lacks the Jurisdiction to re-hear and re-determine a criminal case whose Appeal has been determined and further that Article 165(4) of the Constitution provides that Appeals from the Court of Appeal shall lie at the Supreme Court.

12. Article 23 of the Constitution gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. It states as follows:

**23. (1) The High Court has jurisdiction, in**

**accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**

**(a) a declaration of rights;**

**(b) an injunction;**

**(c) a conservatory order;**

**(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**(e) an order for compensation; and**

**(f) an order of judicial review.**

13. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by Article 165 which establishes the High Court and at sub-article (3) (b) gives the court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

14. The Petitioner claims that his rights under Article 25, 26, 27, 28, 48, 50 (2) (b) (c) and (p) have been violated by the conflicting Sections 297(2) and 389 of the Penal Code. The Petitioner has not asked this court to review his conviction. The Petitioner clearly submitted that his case had run its course. The Petitioner comes to this Court seeking redress for alleged violation of his rights under the Bill of Rights. This being the case this court finds that it does have the jurisdiction to entertain this matter by virtue of Article 23 and 165 (3) (b) of the Constitution.

*b) Whether there is a conflict between Section 297 (2) and 389 of the Penal Code*

15. Section 297 of the Penal Code provides as follows:

**(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to it being stolen, is guilty of a felony and is liable to imprisonment for seven years.**

**(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more person or persons, or if, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

Section 389 of the Penal Code reads as follows-

**Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.**

16. It is common ground that the Petitioner was charged with the offence of attempted robbery with violence contrary to Section 297(2) in Chief Magistrate's criminal case no.1005 of 2006. The lower court convicted him and sentenced him to death. The Petitioner filed an appeal being Mombasa High Court Criminal Appeal No. 209 of 2008 but the High Court upheld both the conviction and the sentence. Further, the Petitioner appealed to the Court of Appeal vide Court of Appeal Criminal Appeal No. 423 of 2010. The Court of Appeal dismissed the appeal.

17. The Petitioner does not dispute his conviction but questions the sentence that was imposed on the grounds that Section 297 (2) and 389 of the Penal Code are conflicting.

18. The Petitioner was charged under Section 297 (2) of the Penal Code which provides the sentence for attempted robbery with violence as death. However, Section 389 provides the sentence for an attempted felony as being imprisonment for a term not exceeding seven years if the intended offence is punishable by death or life imprisonment.

19. The question to ask is this: Is the offence of attempted robbery with violence a felony as per Section 389? Section 4 of the Penal Code defines a felony as an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years. It is evident that attempted robbery with violence does fall within the definition of a felony. What punishment is offered for the offence of attempted robbery with violence? Section 297 (2) on the one hand provides the death sentence while Section 389 provides for a sentence of imprisonment for a term not exceeding seven years if the offence is punishable by death or life imprisonment. There is clearly a conflict between the two Sections as to the sentence that should be meted out for the offence of attempted robbery with violence.

*c) Whether the conflict infringes on the petitioner's fundamental rights and freedoms under the Bill of Rights*

20. The Petitioner contends that the conflict between the aforementioned two Sections of the Penal Code infringed on his right to a fair trial under Article 50 of the Constitution. Specifically, the right to the benefit of the least severe of the prescribed punishments for an offence as enshrined under Article 50 (2) (p) of the Constitution.

21. The Respondent, on its part, claims that the Petitioner was afforded a fair hearing and his rights upheld by the Superior courts and the lower court.

22. Article 259 of the Constitution provides that the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. The Constitution should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.

23. In this case, the Petitioner opines that the conflict created as between Section 297(2) and 389 of the Penal Code infringes on his rights as enshrined in the Constitution. This court must therefore analyze Sections 297(2) and 389 of the Penal Code vis-à-vis the Petitioner's alleged violated rights.

24. The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR**, opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

**“In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:**

**“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict**

constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

25. While analyzing how to determine the intention of a statute, the Court of Appeal in **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR** held that:

**“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”**

26. Article 50 of the Constitution guarantees the Petitioner the right to a fair trial which includes at sub-article (2) (p) the right to the benefit of the least severe of the prescribed punishments for an offence. Sections 297(2) and 389 of the Penal Code provide sentences for the crime of attempted robbery with violence. Section 297 which is the substantive provision for robbery with violence prescribes a sentence of death while Section 389 under which the crime also falls prescribes a sentence not exceeding seven years. In my reading of both provisions of the Penal Code, the drafters of the legislation seem to have created two sentences for the offence in question. As a result, a conflict emanated that can only be resolved by way of amendment. Be that as it may, the Constitution courtesy of Article 2 is the supreme law and any other legislation is subordinate to it. The Constitution mandates that an accused should be entitled to the least severe sentence which in this case is that provided by Section 389 of the Penal Code.

27. Further, there have been instances where appellants faced with similar circumstances as the Petitioner were accorded the benefit of the least severe sentence during their appeals before the Court of Appeal. See the cases of **Evanson Muiruri Gichane vs. Republic [2010] eKLR** and **Boniface Juma Khisa vs. Republic [2011] eKLR**. It would be in line with the provisions of Article 27 to accord the Petitioner the same treatment. In according the Petitioner the same treatment this Court would also be guaranteeing the Petitioner’s right to life under Article 26 and his right to human dignity under Article 28 of the Constitution.

28. It is the finding of this Court that the conflict between Sections 297(2) and 389 of the Penal Code does violate the Petitioner’s rights under Article 26, 27, 28 and 50 (2) (p) of the Constitution.

*d) What orders should be granted*

29. In the case of **Evanson Muiruri Gichane vs. Republic (supra)** the Court of Appeal addressed the conflict between Sections 297(2) and 389 of the Penal Code as follows:

**“We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297(2) and 389 of the Penal Code. The section under which the appellant was convicted provides for death sentence while section 389 provides *inter alia*: -**

**“...but so that if that offence is punishable by death or life imprisonment he shall not be liable to imprisonment of a term exceeding seven years.”**

**The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment of a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences...**

**We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly, this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant’s release from prison since the appellant was convicted and sentenced on 5<sup>th</sup> March, 2004 and should have been sentenced to imprisonment not exceeding seven years.”**

30. Having found that the Petitioner is entitled to benefit from the sentence provided under Section 389 of the Penal Code, this Court makes orders as follows:

a) That an order be and is hereby made that there is a conflict between Section 297 (2) and 389 of the Penal Code as to the sentence for the offence of attempted robbery with violence and the conflict violates the Petitioner’s rights under Article 50 (2)(p).

b) That an order be and is hereby made that the Petitioner is entitled to benefit from the lesser sentence imposed by Section 389 of the Penal Code.

c) That an order be and is hereby made that by virtue of (b) above, the Petitioner having been convicted on 21<sup>st</sup> July, 2008 and having served a sentence in excess of seven years imprisonment, be forthwith and is hereby released from prison unless held for reasons not indicated in the Petition.

**Dated, Signed and Delivered in Mombasa this 3<sup>rd</sup> day of June, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the Presence of:

Mr. Fedha for DPP

Ms. Kitoo for Petitioner

Mr. Kaunda Court Assistant