REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CONSTITUTIONAL PETITION NO. 02 OF 2019

ALEX ABUGA MONYONCHO.....PETITIONER

=VRS=

1. OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....1ST RESPONDENT

2. THE SENIOR RESIDENT MAGISTRATE.....2ND RESPONDENT

3. THE HIGH COURT OF KENYA – NYAMIRA.....3RD RESPONDENT

JUDGEMENT

The petitioner who initially acted in person brought this petition seeking the following reliefs: -

> **"(i) THAT the Order made on 21/05/2014 by the trial magistrate in criminal case no. 1183/2018 (page 28 of the proceedings) by the trial magistrate be declared illegal and quashed by the honourable court.**
>
> **(ii) THAT the order made on 21/05/2014 (page 28 of the proceedings) is detrimental to the petition and borders on constitutionalism in sec 200 (3) which violates article 159 of the constitution that requires trial not to be defeated by technicalities urging further that the criminal case no. 1183/2013 did not comply with section 200 (3).**
>
> **(iii) THAT section 200 (3) is intended to protect the rights of the accused person and that in the instant petition constitutional rights were violated by failure of the succeeding magistrate to explain to the petitioner his rights to summon or recall witnesses.**
>
> **(iv) THAT the court does make a finding that the proceedings in Keroka criminal case were un procedural and set the petitioner at liberty."**

In his undated affidavit in support of the petition he urged this court to uphold the Constitution of Kenya and protect him through the prayers sought.

From the facts set out on its face the gravamen of the petition is that the trial magistrate who convicted the petitioner in the court below did not comply with the provisions of Section 200 (3) of the CPC hence violating his right to a fair trial and when the matter went on appeal to the High Court the judge did not deal with the issue although it was one of the issues he raised in his petition.

Although the petition was served upon the Attorney General, the Attorney General did not enter appearance. It is also not clear how the firm of Ochoki & Co. Advocates which effected the service came on record. Be that as it may when Counsel for the petitioner and Mr. Jami, Principal Prosecution Counsel for the 1st Respondent came before me on 20th May 2019 they sought an adjournment so that Counsel for the petitioner could confirm whether the Attorney General had indeed been served and also so that Mr. Jami could file the 1st respondent's response. It was agreed that they would attend a mention on 13th June 2019. Come that day, the Advocate for the petitioner did not attend and Miss Okok was holding brief for Mr. Jami for the 1st respondent. There was still no appearance for the Attorney General for the 2nd and 3rd respondents. The 1st respondent had not filed a response but noting that the petitioner's submissions were already on record, this court fixed the petition for judgement on 11th July 2019. By the time of writing this judgement the 1st respondent had neither filed a response nor filed submissions and there was still no appearance for the 2nd and 3rd respondents. Justice delayed is justice denied and so I decided to go ahead and write the judgement.

The history of this matter was ably summarized by Learned Counsel for the petitioner. The petitioner was imprisoned for 20 years after being convicted on a charge of defilement. Aggrieved by the conviction and sentence he mounted an appeal in the High Court and argued inter alia that the trial magistrate who convicted him did not explain the provisions of Section 200 (3) of the Criminal Procedure Code to him personally. Counsel reproduced the record of the court which stated: -

> ***"Nyagwencha for accused, its part heard, we seek directions under Section 200 of the CPC to proceed from where it was left.***
>
> ***Court – matter to proceed as elected, proceedings be typed. Hearing on 2/7/2014."***

Counsel submitted that the above did not amount to compliance with Section 200 (3) of the Criminal Procedure Code as the trial magistrate was obliged to inform the accused of his right under the provision and the accused but not his Advocate was then required to elect how he wished to proceed. To support his argument, Counsel for the petitioner relied on the case of **Anthony Musee Matinge Vs. The Republic [2012] eKLR** where Dulu J held: -

> **"55. While the writ was abolished in England by the *Common Law Procedure Act,* it is still in use in the US states is some form or other. The use of the writ of *habeas corpus* has also been adapted to enable convicted persons file post-conviction motions which may only be used to raise a collateral challenge to the validity of the judgement or sentence. Where this is allowed, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post conviction relief is not a substitute for an appeal and the right to file a post-conviction motion was not intended as a second opportunity to argue alleged trial errors. Nor was it intended to provide a forum for re-argument of the issue of guilt or innocence. Post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of federal or state constitutional rights in the proceeding that produced the judgement or sentence under attack."**

He also relied on the following cases where the trials in the courts below were declared a nullity for failure to comply with Section 200 (3) of the Criminal Procedure Code: -

- **Moses Mwangi Karanja Vs. Republic cited with approval in Joseph Ndungu Kagiri Vs Republic [2016] eKLR.**
- **Richard Charo Mbole Vs. Republic (citation not supplied).**

Counsel submitted that whereas this was one of the issues raised by the petitioner in his appeal, Nagillah J, who heard the appeal did not consider it in his judgement. Counsel appeared to completely change the character of the petition and submitted that the appellant had a legitimate expectation that the evidence of the trial court would be subjected to a fresh analysis by the Learned Judge so that he could come to his own independent conclusion. Counsel stated that the omission by the Learned Judge violated the petitioner's right to a fair trial thus occasioning him a lot of prejudice. Counsel urged this court to declare the entire proceedings of the lower court a nullity and to quash the conviction and sentence imposed by that court. Counsel contended that this court has jurisdiction to hear and determine this petition as the same is intended to protect the petitioner's constitutional rights more especially the right to a fair trial.

Non-compliance has caused many trials to be declared a nullity not just by the High Court but by the Court of Appeal as well. In **Wilfred Jack Ouma Vs Republic [2015] eKLR** the judges of appeal stated: -

> ***"Clearly, Sitati, J. did not comply with the requirements of Section 200 (3) of the Criminal Procedure Code which applied in the same way by virtue of Section 201 (2) of the same Act to the circumstances of this case. This was a mandatory requirement that the court was compelled to adhere to, and without such compliance, an ensuing judgement is considered a nullity."***

In **Abdi Adan Mohamed Vs Republic [2017] eKLR** the court observed that **"Section 200 entrenches the accused persons' rights to a fair trial as provided for today under Article 50 (1) of the Constitution."** This observation affirmed Makau J's declaration in the case of **Office of Director of Public Prosecutions Vs. Peter Onyango Odongo & 2 Others [2015] eKLR** that: -

> **"(a) Section 200 (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya is constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya 2010, however the same is not exhaustive in that it is silent on the rights of the complainant in cases taken over by the succeeding magistrate, however that notwithstanding the succeeding magistrate has an obligation before making final orders to invoke the provisions of the Bill of rights to ensure the complainant's rights to a fair trial is factored in."**

It is evident that in his petition of appeal filed in the High Court the petitioner raised the issue of the trial magistrate's non-compliance with Section 200 of the Criminal Procedure Code. In ground 3 of the petition which is reproduced in the judgement of Nagillah J, the petitioner stated: -

> ***"3. The learned magistrate erred in law by not applying Section 200 of the Criminal Procedure Act (sic) chapter 75."***

It is also evident that Nagillah J did not consider or make a determination of that issue in his judgement. The issue for determination by this court is whether that entitles the petitioner to a declaration by this court that his trial was a nullity and a quashing of the conviction and setting aside of the sentence. In other words, whether the petitioner is entitled to have the judgement of Nagillah J reviewed by this court.

In the case of **Wilson Thirimba Mwangi Vs. Director of Public Prosecution [2012] eKLR** Majanja J although he was considering an

application for a fresh trial under Article 50 (6) of the Constitution which is different from the issue raised in this petition discussed the origin of the writ **coram no bis** and stated: -

> **55. While the writ was abolished in England by the *Common Law Procedure Act,* it is still in use in the US states is (sic) some form or other. The use of the writ of *habeas corpus* has also been adapted to enable convicted persons file post-conviction motions which may only be used to raise a collateral challenge to the validity of the judgement or sentence. Where this is allowed, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post conviction relief is not a substitute for an appeal and the right to file a post-conviction motion was not intended as a second opportunity to argue alleged trial errors. Nor was it intended to provide a forum for re-argument of the issue of guilt or innocence. Post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of federal or state constitutional rights in the proceeding that produced the judgement or sentence under attack."**

Going by previous decisions touching on the non-compliance with **Section 200 (3) of the Criminal Procedure Code**, I have cited but just one of them, the order made by the trial court to proceed without informing the petitioner of his rights to recall any witnesses that had been heard by his predecessor was clearly an affront and violation of the petitioner's right to a fair trial and the trial should have been declared a nullity. That notwithstanding the omission to make a determination concerning the magistrate's failure to comply with **Section 200 (3) of the Criminal Procedure Code** is clearly an error on the part of my predecessor Nagillah J. However, it is an error that should best have been canvassed in an appeal in the Court of Appeal. In itself the error cannot be said to be a violation of the petitioner's right. As was decided in the cases I have cited an error that can be set aside on appeal does not amount to a violation of a human right or fundamental freedom and instead of coming to this court the petitioner ought to have appealed. In the case of **Jeremiah Muku Vs. Methodist Church of Kenya Registered Trustees & Rev. Dr. Stephen Kanyaru M'impwi [2007] eKLR** Ouko J, as he then was stated: -

> **"Section 84 of the Constitution gives the High Court pride of place in the scheme of enforcement of the fundamental rights and freedoms of individuals within the borders of Kenya……**
>
> **But it must be remembered that constitutional references are not a panacea for resolution of all types of legal disputes. Invocation of constitutional remedies should only be reserved for serious breaches of the constitution and not for correction of errors either of substantive laws or procedure committed by courts in the course of litigation. The fact that a judgement or a ruling of the court is wrong does not mean that any fundamental rights of the party aggrieved by it has been breached…….**
>
> **It has been held in Chokolingo Vs. AG of Trinidad and Tobago (1981) ULR 108 at P 112 and Maharaj Vs. AG of Tinidad and Tobago (No. 2) 1979 AC 385 that a collateral attack of a judgement (or ruling) through appeal (or through other means) and later through a constitutional reference would be subversive of the rule of law entrenched in the constitution itself.**
>
> **On the other hand, it has been held that if a remedy is available to an applicant/petitioner under some other legislative provision, the court will decline to determine if the applicants'/petitioners' constitutional rights have been violated."**

That judgement was upheld by the Court of Appeal in the case of **Methodist Church of Kenya Registered Trustees & & Another Vs. Rev. Jeremiah Muku [2012] eKLR.** I would also echo the observation by Majanja J in the case of **Wilson Thirimba Mwangi Vs. Director of Public Prosecutions (supra)** that: -

> **"The petition cannot be used as an "alternative forum" to lodge collateral attacks against decision of the appellate court nor can it be used as a general substitute for the normal procedures in the court system which are clearly provided for under Article 50 of the Constitution."**

I hasten to add that bringing this petition to this court is akin to asking this court to sit on appeal over the decision of a court of equal jurisdiction. **Article 50 (2) (q)** provides that a review such as is sought here lies to a higher court. The sub-article states: -

> **"q. If convicted, to appeal to, or apply for review by, a higher court as prescribed by law."**

So whereas the petitioner may be entitled to prayers (i), (ii) and (iii) in the petition, the same cannot be said of prayer (iv) and the judgement of the lower court shall therefore stand. As the respondents did not enter appearance or oppose the petition in any way there shall be no order for costs. The petitioner shall be left to bear his own costs. It is so ordered.

Signed, dated and delivered in Nyamira this 11th day of July 2019.

E. N. MAINA

JUDGE