REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 26 OF 2019

KENNEDY HAMISI ISIGOLI ..... PETITIONER

VERSUS

REPUBLIC ..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Ms. Sombo for the Respondent

RULING

The genesis of this petition can be traced back to the conviction of the petitioner by **Hon. Ruguru (Acting SRM)** on 15.8.2014 for two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and also that of assault contrary to Section 251 of the Penal Code.

The determination of the charge and on the application of the law the petitioner was sentenced to a mandatory death penalty for the offence of robbery with violence and the sentence on other counts on assault though convicted was left in abeyance in view of the death sentence. Being aggrieved with both conviction and sentence the petitioner preferred an appeal to the High Court and his appeal was dismissed in its entirety by **Hon. Ongeri J** on 11.1.2017.

The petitioner further being dissatisfied with the High Court decision, lodged a second appeal to the Court of Appeal against the conviction and sentence.

The Court of Appeal seized of the matter and the grounds of appeal considered the appeal and rendered its decision on 20.3.2019 as follows:

> ***"The appeal on conviction for the two counts of robbery with violence contrary to Section 296 (2) of the penal code dismissed for lack of merit.***
>
> ***However, in consideration of sentence in accordance with the dicta in Francis Karioko Muruatetu v R 2017 eKLR substituted the death penalty with a term of 20 years custodial sentence in respect of Count 1 and 2 whereas Count 3, the petitioner is to serve 2 years imprisonment, the sentences to run concurrently."***

In the current petition filed in court on 25.10.2019, the petitioner seeks review of each of the decisions by the High Court and the Court of Appeal pursuant to Article 165, 22 (1), 23 (1), 25 (a) (c) of the constitution.

The petitioner submitted that two courts failed to consider that he was charged of robbery with violence under Section 296 (2) of the Penal Code whereas the facts seemed to support the elements in Section 296 (1) of the Penal Code.

On this preliminary point the petitioner argued and submitted that there were irregularities in the framing of the charge by the police who ought to have certified a charge under Section 296 (1) in place of Section 296 (2) of the Penal Code.

The petitioner pressed the court not to tolerate the blatant disregard of the Law in light of the various decisions of the court. He placed reliance in the case of **Joseph Kaberia Kahinga & 11others [2016] eKLR** and also the case of **Francis Karioko Muruatetu & another v**

R [2017] eKLR.

Going by the above submissions and principles stated in the cited cases, the petitioner urged this court to re-open the proceedings and make the following declarations.

That the death penalty wholly passed by the trial court and as confirmed by the High Court was unconstitutional, secondly, the petitioner under Article 50 (2) (p) of the constitution his rights to a fair trial were infringed and violated by the state and the court.

Thirdly, the Court of Appeal in setting aside the death penalty and substituting it with a custodial sentence of 20 years for the offence in Section 296 (2) of Criminal Procedure Code and 2 years respectively for assault failed to take into account Section 333 (2) of the Criminal Procedure Code, thereby denying him 3 years remission.

Analysis

The issue before court is whether this court has the competence and jurisdiction to review the decisions of the Court of Appeal. It is apparent that the petitioner wants this court to revisit the entire proceedings which has been determined on the merits from the subordinate court all the way to the Court of Appeal under the enabling provisions of the Criminal Procedure Code and the Court of Appeal Act.

The Law

Article 50 (6) on a right to a fair hearing with regard this petition provides as follows:

> ***" (a). A person who is convicted of a criminal offence may petition the High Court for a new trial if 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). a new and compelling evidence has come available***

The rule to bar an accused person from re-opening litigation on the same set of facts outside the provisions of Article 50 (6) of the constitution was a subject of the decision in the case of **Tom Martini Kibisu v R [2014] eKLR** where in the Supreme Court took the following decision:

> ***"Article 50 is an extensive constitutional provision that quantifies the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petitioner. The high court for a fresh trial, such a trial entails a re-constitution of the High Court forum, to admit the charges and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the Court of Appeal, to the highest court with jurisdiction to try the matter.***
>
> ***Secondly, there must be new and compelling evidence. New evidence means evidence which was not available at the time of the trial and which despite exercise of due diligence could not have been availed at the trial and compelling evidence implies, evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict."***

The underlying rationale in Article 50 (6) of the Constitution resonates in equal measure with the doctrine of resjudicata which gives effect to the finality in litigation and Judgments of the court. The doctrine as expressly stated in Section 7 of the Civil Procedure Act provides as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally determined by such court."***

It is therefore the letter and spirit of Article 50 (6) of the Constitution that in appropriate circumstances to the extent stated therein dependency on the peculiar facts of each case and the issues of Law involved the jurisdiction of the court to review a criminal proceedings and verdict can be invoked.

However, such facts are as emphasized by **Mativo J** in **Philip Maingi v R [2017] eKLR**

> ***1) That the new evidence must be realistic.***
>
> ***2) That the evidence is newly discovered and the petitioner did not know about it prior to or during the trial.***
>
> ***3) The evidence must be material and merely cumulative.***
>
> ***4) The petitioners failure to Learn about the evidence before the verdict was not because of lack of diligence and***
>
> ***5) The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.***

That to me would be an exception to the principle of resjudicata.

Just as was founded in **P. N. Eswara Iyer v The Registrar** The Indian Supreme Court stated:

> ***"A review of a Judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repletion, through different counsel of old and overrated arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."***

The issues for determination as stipulated by the petitioner in his petition also raises a bigger jurisdictional issue as provided for in part 2 (Article (163), (164), (165) of the constitution and part 3 (Article 169 and 170 of the same constitution on system of courts and the relationship between the Supreme Court/Court of Appeal/ High Court/ Environment and Lands Court/Employment, Labour Relations Court and the subordinate courts. The set of courts contemplated under Article 162 are specialized courts exercising judicial authority as part of administration of justice as pertains to Land and Environment, Employment and Labour disputes .

In terms of the constitution decisions of the Court of Appeal are appealable to and reviewed by the Supreme Court whereas decisions arising from the High Court are appealable to the Court of Appeal.

The constitutional scheme allowed only the decisions of the superior courts to be reviewed and the foundation of it is as expressly stated under Article 50 (6). The High Court has the jurisdiction to hear and make a determination on such matters by virtue of the powers vested in it under Article 22 (1) as read with Article 23 of the Constitution. The powers and function of the court can be equated with the principles in **Mohamed v Middlewick No & Another 1917 CPD 539, R v D & Another 1953 45A 384** where the courts observed:

> ***"The court at this stage is not concerned with the merits or demerits of the decision reviewed – Review concerns the regularity and validity of proceedings, whilst appeal concerns the correctness of the decision arrived at in legal proceedings in respect of the relief claimed. Therein and, as such are distinct and dissimilar remedies. They are also irreclaimable remedies in the sense that, where both are available, the review must be disposed of first as if the correctness of the Judgment appealed against is confirmed, a review of the proceedings is ordinarily not available."***

In light of the above principles, the petitioner in this petition deposed that the trial court and superior courts relied on Section 296 (2) of the Penal Code to sentence him to suffer death instead of Section 296 (1) of the Penal Code which provides for a maximum sentence of 14 years imprisonment.

The petitioner submitted that the trial court erred in Law and fact in trying him as it did under Section 296 (2) of the Penal Code which formed the basis of his conviction and sentence. There can be no doubt that according to the reasoning of the petitioner the very point at issue in this matter is not a new matter of evidence which even with due diligence was not available either before the trial court or the two appellate courts. In that previous decision the Judgment of the trial court was duly acknowledged and affirmed by the High Court on appeal which in its wisdom by the decision confirmed both conviction and sentence.

What followed was a second appeal to the Court of Appeal and the question to be determined was whether the petitioner was properly convicted on the counts of robbery with violence contrary to Section 296 (2) of the Penal Code and the third count on assault. The Court of Appeal in its extract it gave stamp of approval to the Judgment of the trial court and the High Court respectively. In the Judgment of the Court of Appeal it is abundantly clear that in their unanimous decision importing the principle in the **Francis Muruatetu case [2017] eKLR,** the question of sentence on the death penalty was set aside and substituted with a term imprisonment of 20 years.

The principle underpinning justice ability of this petition in the exercise of discretion is specifically provided for under Article 50 (6) of the Constitution. It is increasingly clear that the petitioner has not discharged the burden of bringing himself within the ambit of the aforesaid Article to confer jurisdiction to this court to scrutinize the decision of the superior court to proceed to exercise jurisdiction under this Article. The decision is considered final and conclusive for purposes of criminal proceedings against the petitioner. The fact that Section 333 (2) of the Criminal Procedure Code was not specifically mentioned by the Court of Appeal does not mean that in computing sentence of 20 years there is an oversight which occasioned a failure of justice on the part of the petition.

Whatever the issue that may have arisen in regard to the provisions of Section 295, 296 (1), 296 (2) of the Penal Code and the indictment of the petition is not ultra vires or a violation to his right to a fair hearing for this court to entertain the petition.

Before I pen off, it is important to remind the petitioner the elements of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code as sunctitly stated by none other than the Court of Appeal in the case of **Ganzi & 2 Others v R [2005] 1KLR 52** set out elements of the offence of robbery with violence as:

> ***"(a) The offender is armed with any offensive weapon or instrument; or***
>
> ***(b) The offender in company with one or more other persons; or***
>
> ***(c) At or immediately before and or immediately after the robbery the offender would beats, strikes or use other personal violence to any other person.***

From the above dicta the petitioner's fears as to whether he was tried and properly convicted with the right charge by the trial court are not well founded in law. In my view, this is one petition where the prior decision of the Court of Appeal set right the record on the point of Law

and irrespective of the consequences which the petitioner felt needs to be addressed, am bound by the decision and there is nothing for me to declare as manifestly wrong to exercise jurisdiction over the petition.

For this matter, the petition is dismissed for want of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE