



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 27 'B' OF 2017

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 23(1) (2) (3), 21 (1) (2), 22 (3) (c), 26 (1) (2), 48, 50 (2) (b) (c) AND (p) OF THE CONSTITUTION AND SECTION 389 AND 297 (2) OF THE PENAL CODE

BETWEEN

FELIX OCHIENG OMOLO.....PETITIONER/APPLICANT

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

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

JUDGMENT

1. The Petitioner was charged and convicted of the offence 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 on 21st July 2008. 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 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. The Petitioner prays for the following orders:

a) THAT an order be made and declared that Section 297(2) of the Penal Code contradicts Section 389 of the Penal Code as to the sentence of the offence of attempted robbery with violence and goes not only against the letter and spirit of Section 389 of the Penal Code that provides the general penalty for attempted felonies but also against the provisions of the Constitution.

b) THAT an order be made and declared that Section 297 (2) of the Penal Code has no primacy over Section 389 of the Penal Code.

c) THAT an order be made and declared that the Petitioner is entitled to benefit as of right from the general sentence provided under Section 389 of the Penal Code.

d) Subject to order (c), and order be issued releasing the Petitioner from prison as he has served a sentence in excess to that provided under Section 389 of the Penal Code.

3. The Petitioner contends that this court has the jurisdiction to entertain this Petition under Section 84 of the defunct Constitution where the Petitioner's cause arose and Article 23 of the current Constitution. This court can therefore interrogate the constitutionality of Section 297 (2) and 389 of the Penal Code. Additionally, the Petitioner claims that he has exhausted all his appeals and this Petition is his only available remedy.

4. The Petitioner alleges that the Constitution is superior to all other legislations and in case of any conflict, Constitutional provisions prevail.

To expound on this the Petitioner avers that Section 297 (2) and Section 389 of the Penal Code differ as to the sentence for the offence of attempted robbery with violence with Section 297 (2) providing a harsh sentence (death sentence) than Section 389. The Petitioner claims that he should have benefited from the lesser sentence prescribed by Section 389 of the Penal Code. The Petitioner argues that the sentence provided by Section 297(2) offends Article 26 of the Constitution.

5. It is the Petitioner's case that the Constitution does not provide any time limitation as to when a person can lodge a claim for violation of his or her fundamental rights hence this Petition is rightly before this court.

Response

6. The Respondents opposed the Petition by way of Grounds of Opposition dated 25th September, 2017 for the 1st Respondent and 2nd October, 2017 for the 2nd Respondent. The Respondents contend that the Petition offends Article 50 (6) (b) as there is no new and compelling evidence to warrant revisiting of the Petitioner's case. In the alternative, the Respondents aver that the Petitioner's trial was first conducted between 2006 and 2008 under the previous Constitution which did not have any provision similar to that under Article 50(6) of the current Constitution hence the law cannot be applied retrospectively to this matter.

7. Further, the Respondents claim that the effect of grant of the orders sought by the Petitioner will be to upset the hierarchy of the courts as the Petitioner was properly tried, convicted and sentenced and availed all avenues of appeal.

Hearing and Submissions

8. The Petition came up for hearing on 30th October, 2017. The Petitioner appeared in person while **Mr. Mwandeje** appeared for the 1st Respondent and **Ms. Ogega** appeared for the 2nd Respondent.

9. The Petitioner relied on his submissions dated 24th May, 2017. The Petitioner submitted that Section 297 (2) of the Penal Code provides a death sentence for the offence of attempted robbery with violence while Section 389 provides a sentence of seven years for an attempt to commit a felony. The Petitioner argued that attempted robbery with violence is a felony hence its sentence is provided under Section 389 of the Penal Code. The Petitioner pointed out that there was a contradiction between the two Sections. To support this assertion the Petitioner cited the case of **Boniface Juma Khisa vs. Republic Eldoret CRA NO. 268 of 2009** where the Court of Appeal held as follows:

“...the submissions on the legality of it is that Section 297 (2) of the Penal code which prescribes the sentence of death is in conflict with section 389 of the same code which requires that in offences of attempt to commit a felony the sentence should not exceed seven years imprisonment...”

It is manifest at once that there is an apparent conflict in those provisions in relation to the sentence imposed. The section under which the Appellant was convicted provides for death sentence while section 389 provides for a term not exceeding seven years.”

10. The Petitioner submitted that he was not invoking the provisions of Article 50 (6) as there was no new and compelling evidence in his case. Instead, the Petitioner submitted that the courts that tried his case had misapplied the law and sentenced him to a severe sentence while he would have benefited from a lesser sentence. The Petitioner cited the case of **Evanson Muiruri Gichane vs. Republic, Nairobi AC CRA No. 277 of 2007** where the Court of Appeal observed as follows:

“...in terms of section 389 of the Penal Code, the Appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in law may only be resolved by parliament, but the Appellant is entitled to the less punitive of the two.”

11. The Petitioner submitted that this court has the jurisdiction vide Article 23 to hear and determine matters involving violations or threatened violations of rights under the Bill of Rights. The Petitioner argued that even if his case was first heard under the old Constitutional dispensation, the previous Constitution had a similar provision under section 84 where the High Court had the jurisdiction to determine violations of fundamental rights. Further, the Petitioner admitted that his case had gone all the way to the Court of Appeal. However, he submitted that this being an issue of violation of fundamental rights he still has an audience before this court.

12. The Petitioner submitted that he was not asking this court to interfere with the decision of the Court of Appeal but rather to examine the conflict between Section 297 (2) and 389 of the Penal Code and to find that the same has violated the Petitioner's fundamental rights.

13. The Petitioner pointed out that reconciliation of the aforementioned two sections will ensure fair treatment of all accused persons as envisaged by Article 50 (2) (p) of the Constitution and embodiment of other rights articulated under Article 27 (1) (2), 28 and 19 (2) of the Constitution.

14. The Petitioner submitted that sentencing principles require that a sentence should be commensurate to the offence committed and in his case he committed the offence of attempted robbery, and not robbery with violence hence the death sentence imposed was too harsh as compared to the crime committed.

15. Mr. Mwandeje in opposition to the Petition, submitted that there was no new and compelling evidence under Article 50 (6) (b) to necessitate this court revisiting the Petitioner's case. Further, Counsel submitted that the Petition offended the hierarchy of courts. Counsel argued that the Petitioner was charged and convicted by the lower court and appealed to the High Court and then the Court of Appeal but his conviction and sentence were upheld. Counsel submitted that the Petitioner did not allege violation of his rights in any of those courts thus it

was not proper for the Petitioner to now lodge this Petition.

16. Ms. Ogega submitted that there was no contradiction between Section 297 (2) and 389 of the Penal Code. As to the sentence imposed on the Petitioner, Counsel submitted that Article 26 (3) of the Constitution provides a limitation to the right to life.

The Determination

17. 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

18. The Petitioner contended that by virtue of Article 23 of the Constitution this Court has the jurisdiction to deal with this matter. The Respondents, on their part, argued that the Petition offended the hierarchy of courts as the Petitioner's criminal case had already made its way from the lower court to the Court of Appeal and in all the courts his conviction and sentence remain unchanged.

19. 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.

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.

20. The Petitioner claims that his rights under Articles 26, 25, 27, 28, 48, 50 (2) (b) (c) and (p) have been violated by the alleged conflicting nature of Section 297 (2) and 389 of the Penal Code. As I understand it the Petitioner has not in any way approached this court in a manner to suggest that he would like his conviction reviewed. The Petitioner clearly submitted that his criminal 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

21. 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.

22. 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 appeal was dismissed. 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.

23. 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.

24. 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.

25. Is the offence of 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 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

26. The Petitioner contended 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, his right to the benefit of the least severe of the prescribed punishments for an offence as enshrined under Article 50 (2) (p). Also, the Petitioner complained of infringement of his right to life under Article 26 of the Constitution; right to equal protection and equal benefit of the law under Article 27; right to have his dignity respected and protected under Article 28 and the right to access to justice under Article 48 of the Constitution.

27. The Respondents, on their part, claim that the Petitioner was afforded a fair hearing and his rights were upheld by the Superior courts and the lower court. Further, the Respondents point out that the Petitioner has never raised the issue of infringement of his fundamental rights and freedoms in any of the courts that dealt with his criminal case.

28. 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.

29. 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 enshrined on 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.

30. 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 v. 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.”

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.”

31. 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 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.

32. 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 affording the Petitioner the same treatment this court would also be guaranteeing his right to life under Article 26 and his right to human dignity under Article 28 of the Constitution.

33. It is the finding of this court that the conflict between Sections 279(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

34. 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 5th March, 2004 and should have been sentenced to imprisonment not exceeding seven years.”

35. 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 right as espoused under Articles 26, 27, 28 and 50 (2) (p) of the Constitution.

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 21st 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.

d) Each party to bear its own costs.

Dated, Signed and Delivered in Mombasa this 5th day of July 2018.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Mwandeje for the 1st Respondent

Ms. Ogege for the 2nd Respondent

Petitioner in person

Mr. Kaunda Court Assistant