

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CONST. PETITION CASE NO. 1 OF 2015

REPUBLIC

VERSUS

PETER MURUKI GATHIRO

JAMES MWANGI WANJAMA

JUDGEMENT

The petition dated 25/2/2015 seeks an order of declaration that the petitioners' constitutional rights were breached and contravened. The basis of the application is that the trial court amended the charges during judgement. The amendment was not called for by the prosecution. This action prejudiced the petitioners. The petition is supported by the petitioner's joint affidavit.

Mr. Gekanana advocate appeared for the petitioners and undertook to file written submissions. No submissions were filed by the advocate. The petitioners themselves filed written submissions in support of the petition. It is submitted that the petitioner's fundamental rights as enshrined under Articles 20(1) (4), 21(1) and 22 were violated. The petitioners were arrested and had evidence fabricated against them. The trial court amended the charge sheet and the petitioners rely on the case of HARISON MIRUNGU NJUGUNA VS REPUBLIC Criminal Appeal no. 90 of 2004. In that case, the court held that the right to hear the witness give evidence afresh on the amended charge and cross-examine the witness further is a basic right going to the root of a fair trial.

The petitioners submit that the charge sheet was substantially amended without notice to both parties. The charge sheet indicated that the offence took place on 14th February, 2007 at the about 2.00pm. However, the judgement indicated that the offence took place on 12th February, 2007 at about 2.00pm. Section 214 of the criminal procedure code calls upon the trial court to read over the charges again to the accused after the amendment. The amendment was not called upon by the prosecution.

It is further submitted that the amendment of the charge sheet breaches the petitioners' constitutional rights. The petitioners also rely on the case of JOSEPH KAMAU GITAU vs REPUBLIC, Nairobi High Court Criminal Appeal No. 1002 of 2002. According to the petitioners, Article 23(1) (3) of the constitution gives powers to the High Court to make such orders that will go a long way to enforcing, promoting and securing fundamental rights. The petitioners also contend that the circumstances of the case did not call for a death penalty. The petitioners submit that a new trial should be ordered.

The state opposed the petition and filed a replying affidavit sworn by Mr. David Fedha on 30th March, 2015. It is submitted that the petitioners were convicted by the trial court on charges of robbery with violence and sentenced to suffer death. Their appeals to the High Court and Court of Appeal were dismissed. The charge sheet was not amended. The case started **de novo** on 16th July, 2008 and section 200 of the criminal procedure code was complied with. The petitioners were called upon to plead to the charges. No new compelling evidence has been brought forward by the petition.

The only issue being raised by the petition is that the trial court amended the date of the offence from 14th February, 2007 as per the charge sheet to 12th February, 2007. The record shows that initially, six people

were charged. The initial charge sheet gave the date of the offence as 14th February, 2007. The charge sheet was amended by hand to read 12th day of February, 2007. The amendment was done on 28/2/2007 and it is signed by the trial magistrate. The was the date the initial plea was the date taken on 11th May, 2007 the prosecution withdrew the case against the 4th, 5th and 6th accused respectively. These were David Mwangunda Livingstone alias Salim, James Abia Laiza and Hilary Shimonje. The withdrawal was done under section 87(a) of the criminal procedure code. The trial court ordered that the case starts **de novo** on 16/7/2008 after the first magistrate was transferred. The petitioners took a fresh plea and no new charge sheet seems to have been introduced at that stage.

The judgement of the trial court indicate that the petitioners faced four counts of robbery with violence. The judgement indicate that the offence was committed on 12/2/2007 at about 2.00pm. The two other judgements for the High Court and Court of Appeal refer to the same date. The three complainants who testified stated that the offence occurred on 12th February, 2007. The charge sheet gives the date of arrest as 14th February, 2007.

The record of the trial court show that in their respective sworn defenses, the petitioners were aware that the date of the offence was 12/2/2007. They all tried to explain their whereabouts on 12/2/2007. The petitioners all along knew that they were charged of having committed the offence on 12/2/2007. They were aware of the judgement of the trial court. The record shows that the date was amended on 28/2/2007. Even if there was no amendment, the evidence on record show that the offence took place on 12/2/2007.

Section 214 (2) of the criminal procedure code state as follows:-

Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

The variance in time under the above section includes the date of the offence. It cannot be limited to the specific time when the offence occurred. It is therefore clear to me that the offence occurred on 12/2/2007. The evidence points to that fact. There is no amendment of the charge sheet. The petitioners could have raised the issue with the High Court or Court of Appeal if indeed this was a valid issue. I do find that the indication in the judgement to the effect that the offence occurred on 12/2/2007 does not infringe on the petitioner's constitutional rights, no rights were violated. The petition herein does not raise any new and compelling evidence. It lacks merit and is hereby dismissed.

Dated, signed and delivered in Malindi this 9th day of March, 2017.

S.J. CHITEMBWE

JUDGE