



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO.31 OF 2014

**ORIGINATING FROM CRIMINAL CASE NO. 1846 OF 1996 OF THE PRINCIPAL
MAGISTRATE'S COURT AT MOMBASA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 27 (1) (6), 47 (1) (2)(3) AND 50 (1) (2) P (3) (6) (A) (B) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

BETWEEN

MOHAMED ALI RINGI.....PETITIONER

AND

HON. ATTORNEY GENERALRESPONDENT

RULING

1 The Petitioner, MOHAMED ALI RINGI, filed an undated petition under certificate of urgent by way of Notice of Motion under Article 506 (a) (b) of the Constitution, in which he seeks the following orders;

(1) For fair trial because he was not supplied with the charge sheet first to understand the nature of the charge he was facing and was not also supplied with statements of the witness before first to charge him prepare for his defence and the facts prepare for his defence and he feels prejudiced as stated in Article 50 (2) (h) and (j) of the new Constitution .

(2) For fair trial because the mentioned essential witnesses that is, the arresting officer in the case and doctor were never called to testify or cross examined and so he feels having been prejudiced and begs for a retrial.

(3) For fair trial as the mitigation he gave as per section 329 of the Criminal Procedure code were not considered as the trial court informed him that there is only one sentence prescribed by the law to the charges under section 296 (2) of the Penal code which is mandatory death sentence and hence there was need for the trial court to have considered his mitigation together with the evidence on record, nature and circumstances of the case before sentence was arrived at, hence he was prejudiced.

2 The Petitioner named the Attorney General as the Respondent. On request by the representative from the office of the Attorney General, Miss Namalia, the Director of Public Prosecution was directed to participate as it is primarily a criminal matter.

3 The brief background of the matter before me is that the petitioner, was charged with the offence of robbery with violence contrary to section 29 (2) of the penal code before the Principal Magistrate, court at Mombasa, being Criminal case No. 1840 of 1996.

He was also charged with two other offences of being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) of the firearm Act Cap114 of the Laws of Kenya and being in possession of two rounds of ammunition without holding a firearms certificate contrary to section 4 (2) (a) of the firearm Act, Cap.14 of the Laws of Kenya.

The petitioner was found guilty and convicted for all the counts by the Principal magistrate who sentenced him to serve;

(a) Seven (7) years imprisonment for the offence of robbery with five (5) strokes of corporal punishment together with five (5) years police supervision ;

(b) In count 2 and 3, the petitioner was fined Ksh 20,000 and in default, serve one (1) year imprisonment.

4 The Petitioner appealed against the conviction and sentence to the High court in Mombasa where the appeal was heard and the Honorable court upheld the evidence that was adduced before the trial magistrate, set aside the seven (7) years sentence on robbery and substituted it with death sentence for robbery with violence and confirmed the sentences that were meted upon him in counts 2 and 3.

5 The petitioner then appealed to the court of appeal which heard the case and confirmed the sentence of death that was meted out on him in respect of the offence of robbery with violence contrary to section 210 (2) of the penal code as he had been charged in count 1. And as a result of the sentence of death that was meted upon him, the court of appeal suspended the sentences for counts 2 and 3.

6 When the Constitution of Kenya, 2010, was promulgated, rights for citizens were increased, which included that of prisoners who had already been condemned to suffer certain sentences.

It is then, I believe, that the petitioner, felt there was a window of hope which he could exploit to secure his freedom (release). As a result, he filed this current Constitutional petition pursuant to Article 50 (6) of the Constitution, 2010, where he complains that he was not made aware of certain rights during his trial, hence he was prejudiced. It is therefore his case, that his Constitutional rights were violated and this court ought to revisit the matter according to the jurisdiction conferred upon him by Article 50 (6) of the Constitution.

7 The state, through the Director of Public Prosecution has objected to the petition and filed preliminary objections based on the Principle being developed that the appellant has no right in law since his conviction and sentence happened before the promulgation of the new Constitution.

8 The parties appeared before me, and through their counsel, M/s Ocholla, learned counsel for the state and Mr Nabwana , learned counsel for the accused, advanced rival arguments.

9 According to M/s Ocholla, counsel for the state, Article 264 of the Constitution is very clear, that on the date of the promulgation of the new constitution, the old constitution shall stand repealed subject to schedule 6. The effect of this being that the Constitution does not have a retrospective effect and cannot invalidate that which was legal when the old Constitution was in force. She prayed that the petition be struck out as the petitioners appeals were determined before the passing of the new Constitution which did not have such provisions forShe cited the following authorities where such petition were addressed, being;

(a) DAN OLUOCH OTIENO AND ANOHTER V REPUBLIC

(b) MACHARIA VRS KCB Supreme Court decision.

10 In response, Mr Nabwana counsel for the petitioner, submitted that the main ground of the petition is that the petitioner's rights were infringed upon because before his appeals were heard, and determined, he was not informed of aof the fact that the sentence may be entered. He pointed out that apart from relying on the constitution 2010, he also relied on the provisions of section 329 of the Criminal Procedure code and section 296 (2) of the penal code. He argued that the petitioner could not have drafted his petition under the old Constitution when it had ceased to exist. He invited the court to read through the petition and would find out the petitioner was not given a opportunity to either withdraw his appeal or warned of the effect of proceeding with the appeal as it was as it would result into his sentence being enhanced into a death sentence. He urged the court to look at his authorities which he said were court of appeal decisions which supersede the one cited by the state, which are High court decisions. He prays that the court finds the preliminary objection as not basis and that the petitioner has an arguable petition since article 50 (6) of the Constitution is about the right of fair trial.

11 M/s Ocholla, responded to this by arguing that the petitioner before was seeking for a retrial under Article 50 (6) of the Constitution and not for the sentence that had originally been meted out on the petitioner by the trial court to be reinstated.

12 As I understand the Constitution of Kenya, 2010, the right that came with it expanded on those that were already vested and a new dawn was ushered in, to be enjoyed by all.

There was no deprivation of right save to be enjoyed by all, be they prisoners serving sentences. A Constitutional right is one that a party enjoys without restrictions. The Constitution of Kenya, 2010 was drafted in such a manner that focus was placed on the access of justice.

Article 159 of the Constitution, 2010 was checked deliberately to encourage parties with a good case to approach this court for redress. To make it available to parties to argue their cases, emphasis was placed on the quality of the case, and not any form or technicalities that will leave parties with a sense of denial.

13 The matter before court raises two pertinent situations apart from what the parties argued before me.

The first part begs the following questions-

(a) What benefit of the law is the petitioner enjoying after he was sentence to death and is now serving a life sentence?

The answer to the question calls for consideration of the law which was applied to commit the sentence of death to that of life imprisonment.

With all fairness, the petitioner has enjoyed all the benefits of the law guaranteed by Article 48 of the Constitution, 2010, which provides that;

“The state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice”

14 His litigation has seen full circle up to the presidential pardon. He is asking for more after the presidential pardon which committed the death sentence to life imprisonment.

Article 133 (1) of the Constitution state as follows:

“On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory committee established under clause (2) by;

(a).....

(b).....

(c) substituting a less severe form of punishment

(d).....

The mandate given to the president is made and he is assisted by a committee established by Article 133 (2) of the Constitution, 2010, which comprise of the following highly placed individual who have a wide field from which it can derive advise-

(a) The Attorney General;

(b) The cabinet secretary responsible for correctional services;

(c) at least five other members as prescribed by an Act of parliament, none of whom may be a state officer'

Presidential pore of mercy is not exercised by mere whims as a political advantage. It is based on merit because those who were wronged can take the law into their hands if they feel aggrieved by the decision.

By virtue of article 133 (3) of the Constitution, the sentence to be applied is also a Constitutional consideration whereby-

(d) the procedure of the Advisory committee, and

(e) the criteria to be applied by the Advisory committee in formulating its advise are subject to the constitution.

By Article 133 (4) of the Constitution, the committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the president.

15 There is wide consultation such that full extent of the office is taken into account and this gives the committee a unique opportunity to take into account new and compelling matters before it gives advise to the President.

In the performance of the functions of the exercise of powers under the Constitution and the Act, the President and the committee in accordance with Article 47 (1) of the Constitution, 2010 and are guided by the values and principles of article 10 of the Constitution, 2010

Article 47 (1) of the Constitution guarantees a person a right of Administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Article 10 of the constitution , 2010 provides for material values and principles of governance that bind all state organs, state officers, public officers and all persons whatever any of them

(a) applies or interprets the Constitution ;

(b) enacts, applies , or interprets any law ;or

(c) makes or implements public policy decisions.

Natural values that are relevant to this matter are the rule of law, human rights, integrity and transparency.

To enable the committee carry out its functions, section 14 of the power of mercy Act No 21 of

2011 provides as follows;-

“In addition to the functions set out in Article 133 (1) and (4) of the Constitution, the committee

- (a) undertakes research or commission the same and collects data regard of the power of mercy
- (b) works with state organ responsible for correctional services
- (c) carry out investigations required to make a determination of the power of mercy;
- (d) educate the public of the power of mercy

This way, the committee charged with the duty to advise the President has a wealth of information on the consideration before it and therefore to challenge its decision, one needs to have full data of what the committee relied on.

16 The petitioner, herein cannot land before this court the criteria which was relied upon by the committee to make the recommendations so as to enable this court to give its opinion. However, the law does not have a part to re-petition, if there is a feeling that certain material facts would have changed the opinion had the matter be considered.

17 This court has not been informed by the petitioner the manner in which the power of mercy which was exercised by His Excellency, the President, whether it was general communication to all condemned prisoners to benefit from the liberal power of mercy or this was a specific case that was dealt with by the committee. There is elaborate procedure under part III of the power of mercy Act, No 21 of 2011.

Section 19 (1) and (2) of the said Act specifics who is eligible to petition the President.

Section 79 (1) of the power of mercy act provides as follows;

“Any person may, subject to the Constitution and this Act, petition the President through the committee, to exercise the power of mercy and grant any relief specified in article 133 (1) of the Constitution”

The reliefs provided for under Article 133 (1) of the Constitution are as follows;

- “(a) granting a free or conditional pardon to a person convicted of an offence;
- (b) post-pointing the carrying out of a punishment either for a specified or indefinite period;
- (c) substituting a less severe form of punishment;
- (d) remitting a less severe form of punishment.”

The only restriction to a petitioner for power of mercy is as set out by section 19 (2) of the power of mercy Act, that-

- “(a) the person for whose benefit it is made, is on probation on serving a suspended sentence;
- (b) an application for judicial remedy is pending in court;

18 The committee of power under section 21 of the power of mercy Act in determining the admissibility of the petition to take into account

- (a) calling for evidence ;
- (b) conducting interviews;
- (c) receiving and reviewing the necessary reports from appropriate government agencies or official.

In any view, that is a more intensive and inclusive remedy that goes beyond the record of judicial proceedings. This part read together with section 22 of the same Act which gives elaborate matters of a personal nature, the trial, investigations, the correctional institutions, makes a recommendation.

By virtue of section 24 of the power of mercy Act, No. 21 of 2011, a person can re-petition after the rejection once based on

- (a) new grounds that raise reasonable facts

19 For the reasons stated herein, the petition filed in this court in 23rd May, 2014 is incompetent and is hence dismissed with no orders as to courts.

I, however make the following orders;

- (a) The petitioner is at liberty to re-petition the President under the power of mercy;
- (b) The office of the Director of Public Prosecutions and the Prisons Authorities may facilitate by compiling a record for the same
- (c)There shall be no further constitutional petitions before thou.

Orders accordingly.

Ruling delivered, signed and dated this 3rd day of May, 2017

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr Egunze holding brief for Mr Nabwana in for petitioner

Petitioner - Present

C/clerk- Kiarie