



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 9 OF 2015

MAURICE ODONGO.....PETITIONER

AND

HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The Petition of Maurice Odongo is for a new trial on the ground of new and compelling evidence. The Petition is expressed to be brought "Under Section 23(1), (3) and (8) (sic) and Section 50(6) a, b (sic) of the Constitution. In his affidavit in support of the application he states as follows:-

- 1. That, I am a male of sound mind well, versed with legal hearing of an oath and therefore able to swear this affidavit.***
- 2. That I was sentenced to serve 20 years imprisonment which sentence was later commuted to suffer death sentence by the court of appeal on the 19th day of June 2015.***
- 3. That the decision of the learned judges at the second appellate court was made without jurisdiction as per the provision of the criminal procedure code section 169(2) yet a member of judiciary is not liable of anything omitted.***
- 4. The learned judges erred in law and fact by failing to find that the respondent should have filed a formal application for the interpretation of section 203 and 202 chapter xix – murder and manslaughter.***
- 5. The learned judges having found that there are no legal provisions in favour of the appellant, for a fair hearing during a criminal trial, erred in law and misdirected themselves in proceeding to make the impugned order.***
- 6. The learned trial magistrate erred in law in misapprehending and misrepresenting the principle in OKENO -VS- REPUBLIC [1972] E.A. 32) in failing to apply the correct principle correctly and in failing to seek and weigh conflicting evidence to draw its own conclusions with the evidence as per the conflicts.***
- 7. The learned trial magistrate misdirected themselves in arriving at the decision based on belief and anticipations which were not supported by any evidence. Yet the mandatory death sentence of the provision of section 203 prescribing death sentence is at variance with section 202 of the penal code as per proceedings. Which prescribes punishment for manslaughter which was applied by the high court and the decision of the learned judges of the second appellate court displays manifest bias against the petitioner.***

8. *That access to information contravened as enriched under article 35(1) b (2). This is a reference of the rights of arrested persons under article 49(1)(f) see in the case of PAUL MWANGI MURUNGA VS REPUBLIC Cr. Appeal NO. 35 of 2006 (unreported) this court having cited the case of NDEDE VS REPUBLIC (1991) KLR 567, delivered itself as follows: "The appellant in this case had been brought to court some thirty days after his arrest. It was one of those cases which were then called (the mwakenya cases)". The court chose to see no evil, and sought no explanation as to where the accused persons involved in these cases had been before being brought to court. The consequence of the silence on the part of the courts was the infamous "NYAYO HOUSE TORTURE CHAMBERS. It is a history about which the courts of this country can never be proud of."*

9. *That the court to constitute the constitution in accordance to article 259 as article 50 (4) of the constitution was violated during trial.*

10. *That section 203 of the penal code which provides for a mandatory death sentence is anti-ethical or the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. Note that while the constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. See GODFFREY MUTISO VS REPUBLIC. The court of appeal agrees with the decision.*

Your petitioner therefore prays that:

i) *That the honourable court be pleased to grant a declaration that the constitutional rights of the petitioner have never been breached by the respondent by convicting and sentencing the petitioner.*

ii) *That the respondent be ordered to release the petitioner.*

iii) *That section 203 of the penal code contradicts section 202 as to the sentence of manslaughter and goes against the bitter and spirit of the constitution enriched in article the bitter and spirit of the constitution enriched in article 26(1 & 3) and article 50(2) of the constitution of Kenya and the benefit of contradiction should be given to the petitioner.*

iv) *That the casts be provided for in favour of the petition in any event.*

v) *That whatsoever is deponed here-above is true to the best of my knowledge."*

When the petition came up for hearing before me on 26th October 2015 Miss Wakio, Learned Prosecution Counsel informed the Court that the Petitioner had petition No. 9 of 2015 where he had filed submissions challenging the death penalty and she wanted the Court to ask him how he wished to proceed. It was then that he requested this Court to consolidate the two petitions which application I allowed and proceeded to hear his submissions.

In his submissions he stated that he wanted this Court to assist him as whatever took place was never his intentions; that he merely wished to have the sentence imposed on him reduced and was not opposed to the sentence per se. He urged the Court to consider his submissions as well.

On her part Miss Wakio opposed the application. She submitted that no new and compelling evidence was demonstrated to warrant the Court to order a new trial; that the Petitioner had not placed any material before this Court save for his own analysis and that the same only amounts merely to a plea in mitigation.

As regards the death sentence she submitted that is what is prescribed by the law and it cannot be reduced by this Court although should he wish to do so he can file an application in the Supreme Court. She urged this Court to dismiss the Petition for being frivolous and order the Petitioner to continue serving the

sentence imposed upon him in accordance to the law.

In reply he stated that PW1 had given evidence that the deceased had been found 150 meters from his house hence the reason he was seeking the assistance of this Court.

As earlier stated this Petition was consolidated with Petition NO. 9 of 2015 in which the Petitioner has challenged the death sentence imposed upon him as being unlawful. It is however not very clear whether his challenge is as regards the death penalty itself or it is as regards the severity of the sentence imposed by the trial Court. This is because ground 3 of that petition states:-

"3. That section 203 of the Penal Code contradiction is contradicted by section 202 of the penal code as to the sentence for the offence of manslaughter and goes against the better and spirit of the constitution enshrined in article 26(1 & 3) and article 50(4) of the constitution of Kenya and the benefit of the contradiction should be given to the Petitioner."

His written submissions in the petition also oscillate between saying the death penalty is unconstitutional and that death sentence is for murder but not manslaughter. Be that as it may the petition cannot succeed. As to the constitutionality of the death penalty this has long been settled by the five Judge Court of Appeal Bench in **JOSEPH NJUGUNA MWAURA & 2 OTHERS V. REPUBLIC NAIROBI CRIMINAL APPEAL NO. 5 OF 2008** where it was held:-

"Death as a penalty has been sanctioned by the constitution. We believe that as the Court before us in GODFREY MUTISO V. REPUBLIC correctly held: "the death penalty remains a lawful sentence in Kenya and appears set to remain so for a long time to come." To suggest that the Articles of the Constitution outlaw the death penalty is with respect a great danger to the people of Kenya and that is a remarkable departure from the tenets of constitutional interpretation. We think we have said enough to show that the death penalty is, contrary to the appellant's arguments grounded in the constitution."

That Court went further and held that where the death sentence is prescribed as the mandatory sentence it must be imposed. They stated:-

"..... In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do do."

The Petitioner's first ground in Petition NO. 9 of 2015 cannot therefore hold. It is of course to be understood that there is a petition regarding this issue pending in the Supreme Court and as we await the decision of that Court that of the Court of Appeal still stands. Ground 2 is an issue of appeal and not for this petition. If indeed the Court imposed the wrong sentence (death) instead of life imprisonment he ought to have appealed.

As for Misc. 107/2015 he craves for a new trial under Article 50(6) of the Constitution. To succeed however he must demonstrate that there is new and compelling evidence. The Supreme Court has defined new and compelling evidence in **TOM MARTINS KIBISU V. REPUBLIC [2014] eKLR** as 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. It defined "compelling evidence" as 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."

In the instant case the Petitioner has not raised any new or compelling evidence. He merely attacks the enhancement of his sentence for 20 years to death by the Court of Appeal, and contends that the Court had no jurisdiction to do so. He also contends that the Court erred in failing to evaluate and reconsider the evidence of the lower court as is the principle in **OKENO V. REPUBLIC [1972] E.A. 32**. He also attacks the judgment of the trial magistrate. The window opened by Article 50(6) of the Constitution is

not for a third appeal but for a new trial based on the discovery of new and compelling evidence. That is not the case here and accordingly this Petition must likewise fail. Accordingly both Petition No. 9 OF 2015 and Miscellaneous 107 of 2015 are dismissed.

Signed, dated and delivered at Kisumu this 11th day of February 2016

E. N. MAINA

JUDGE

In the presence of:-

Miss Wakio for the state

The Petitioner in person

CC: Felix Magutu