



REPUBLIC OF KENYA
IN THE HIGH COURT
AT HOMA BAY
PETITION NO. 3 OF 2016
(FORMERLY MIGORI HC. PETITION NO. 31 OF 2015)

BETWEEN

DICKSON OKELLO OUKO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner has filed a petition under **Article 50(6)** of the Constitution. He was tried, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in *Homa Bay Senior Resident Magistrates Court Criminal Case No. 695 of 2006*. He appealed his conviction to the High Court at Kisii, *Kisii HCCRA No. 192 of 2004*. His appeal was dismissed on 24th March 2006 (Bauni and Warsame JJ). His second appeal to the Court of Appeal, *Kisumu CA Criminal Appeal No. 173 of 2006* was dismissed on 28th July 2011 (O’Kubasu, Waki and Onyango Otieno JJA). The petitioner also filed an application for retrial under **Article 50(6)** of the Constitution being *Homa Bay High Court Misc. Application No. 12 of 2014* which was marked as withdrawn on his own application on 13th August 2014.

2. The petitioner contends that the death penalty imposed on him was unconstitutional and constitutes inhuman and degrading punishment contrary to the Constitution and international human rights instruments to which Kenya is a party including the *Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights* and the *African Charter on Human and Peoples Rights*. He submits that in light thereof, he should be given an opportunity to offer mitigation before a fresh sentence is imposed upon him.

3. Mr Oluoch, learned counsel for the respondent, opposed the application and submitted that the issues raised by the petitioner concern the legality of the death penalty which does not constitute new and compelling evidence under **Article 50(6)(b)** of the Constitution. He submitted that the death penalty is a lawful punishment permitted by **section 205** of the *Penal Code* and forms an exception to the right to life guaranteed under **Article 26(3)** of the Constitution. Counsel referred to the decision of the Court of Appeal in *Joseph Njuguna Mwaura and Others v Republic CA NRB Criminal Appeal No. 5 of 2008 [2013]eKLR* where the Court of Appeal declared that the death penalty was not a violation of the Constitution.

4. The petitioner has invoked **Article 50(6)** of the Constitution which provides as follows;

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if

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(a) 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) new and compelling evidence has become available..

5. It is clear from the provisions I have set out above that legality or otherwise of the death penalty or the sentence imposed on the petitioner in the circumstances set out in the petition is not new and compelling evidence hence the application lacks merit.

6. In his deposition, the petitioner avers that in light of previous decisions of the Court of Appeal which held that the death penalty was not mandatory, this court should reconsider the law and revise the sentence for his benefit and for the benefit of the people in his situation. Although I have found that the application does not lie, I would only wish to state that I am bound by the decision in **Joseph Njuguna Mwaura and Others v Republic (above)** which directs the court to apply the death penalty in accordance with the law.

7. The petitioner's case cannot succeed. It is dismissed.

DATED and DELIVERED at HOMA BAY this 8th day of March 2015.

D.S. MAJANJA

JUDGE

Applicant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.