

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PET. NO. 3 OF 2015

JOHN NJERU IRERI.....PETITIONER

=VERSUS=

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

R U L I N G

The Constitutional Petition dated 24th March 2015 is brought on the basis that the Petitioner's constitutional rights and fundamental freedoms were violated. The petitioner together with three others were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. His co-accused were acquitted while he was convicted and sentenced to suffer death.

The petitioner filed criminal appeal number 502 of 2010 before the Mombasa High Court. The appeal was disallowed. A second appeal to the Court of Appeal (Appeal No. 191/2012) was dismissed on 17th October 2014. Five months later, the petition was filed. The main issue being raised in the petition is that the petitioner was not allowed to mitigate by the trial court.

The state raised preliminary objection through miss Mathangani, prosecuting counsel. Counsel maintains that all the issues being raised were dealt with by the High Court and Court of Appeal. There is nothing new being brought out by the petition. There is no new and compelling evidence being brought out by the petition. On his part, the petitioner maintains that he has not brought the current petition under Article 50(6) of the Constitution. He has come under Article 23 of the Constitution seeking enforcement of his rights by the court.

The entire petition raises the issue of mitigation. The record of the trial court shows that since it is only the petitioner who was convicted, he was allowed to mitigate. The petitioner asked the court to provide him with court proceedings. The prosecutor indicated that he had no past records for the petitioner. The Judgment of the High Court in its last paragraph indicate that the petitioner was given an opportunity to mitigate.

Given the petition herein and the records of the three courts which handled the petitioner's case , I do find that there is nothing new for the court to handle. The provisions of Article 23 of the Constitution does not give powers to this court to re-open closed criminal proceedings. The issue of mitigation cannot be brought by the petitioner as a way of enforcing his constitutional rights. In any case the sentence for robbery with violence is death. Although it is procedural for a person convicted of robbery with violence to mitigate, that does not change the situation. Even if the petitioner was denied an opportunity to mitigate, that cannot be the basis for a constitutional petition to this court seeking enforcement of rights. In the current case, the petitioner was accorded the right to mitigate.

I do find that the entire petition herein lacks merit and is an abuse of the court process. The preliminary objection is upheld. Violation of section 216 of the Criminal Procedure Code during a criminal trial cannot be the basis of a constitutional petition. The petition is hereby struck out.

Dated and delivered in Malindi this 10th day of March, 2016.

S.CHITEMBWE

JUDGE