

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONST. PET. NO. 11 OF 2015

JUMA OMAR MWALEWA.....PETITIONER

=VERSUS=

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

R U L I N G

The Petitioner was charged with the offence of Robbery with violence in Mombasa Criminal Case NO. 2083 of 2009. He was convicted to suffer death. He appealed to the High Court, vide, Mombasa Criminal Appeal Number 155 -157 of 2011. his two co-accused's appeals were allowed but the Petitioner's appeal was dismissed.

The Petitioner filed the current petition and the main contention is that the trial court denied him the right to mitigate and therefore his constitutional right under Articles 20, 21, 22, 23 and 40 of the Constitution were violated. Since his rights were violated, the Petitioner would like the court to set aside the conviction and sentence and order his release from prison.

The state, through Miss Mathangani, raised a preliminary objection. Counsel contends that the Petition does not raise any new evidence. All the issues being raised were raised in the appeal. The current Petition is a disguise second appeal. On his part, the petitioner submitted that the petition is not brought under Article 50 of the Constitution. He is not claiming that there is new and compelling evidence. All what he is alleging is that his rights enshrined in the constitution were violated. He was not allowed to mitigate by the trial court.

I have read the petition and it is clear to me that the only alleged right that was violated is the issue of mitigation. The petitioner does not raise any other issue in his entire petition. The record of the trial court shows that Judgment was read on 6th July 2011. The appellant and his two co-accused were convicted. The appellant was the first accused. Although the record of the trial court does not indicate that the accused were called upon to mitigate, it does not indicate that the petitioner prayed for leniency. His two co-accused also prayed for leniency. This was before the sentence was passed. It is therefore clear to me that the petitioner was accorded the opportunity to mitigate and he prayed for leniency.

The Petitioner maintains that his rights were violated and would

like to be released from prison. Even if the petitioner was denied the right to mitigate, that would not be a good ground for the court to order his release. He could have raised the issue of mitigation during the appeal. Mitigation or lack of it cannot lead to acquittal through a constitutional petition. Article 23 of the Constitution provides the relief the court can grant where a right has been violated. Such reliefs do not include release from prison after one has been convicted. A declaration of rights under Article 23 of the Constitution does not entail release from prison.

In the end, I do find that the preliminary objection is well merited. The current petition is an abuse of the court process and is hereby struck out.

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

S.CHITEMBWE

JUDGE