



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTION PETITION NO. 14 OF 2015

THE NEW CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM) HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL UNDER ARTICLE 25 (A) (B) AND (C), 26 (1), 27 (1) (2) AND (4), 28, 29 (A), 48, AND 50 (1) (2) (P) AND ARTICLE (23) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 21 (1) AND 259 (1) (3) OF THE GENERAL PROVISIONS OF THE NEW CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 179 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

MICAH MWANGWALE MWATA.....1ST PETITIONER

DENIS MWAMBELA MWAWASI.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBIC PROSECUTIONS.....RESPONDENT

JUDGEMENT

The two petitioners were charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The case was heard before the court in Voi. The petitioners were convicted and sentenced to suffer death.

The petitioners filed Criminal Appeal No. 297 of 2008 before the High Court in Mombasa. The appeal was dismissed on 14th February, 2012. A second appeal (No. 77 of 2012) was filed before the Court of Appeal in Malindi. The second appeal was also dismissed on 20th March, 2015.

The petitioners have now filed the current petition before this court. The main issues being raised in the petition is that their constitutional rights to a fair hearing were breached as they did not access witness statements. It also appears that the petitioners are contending that the death sentence is excessive.

In their written submissions the petitioners maintain that the trial court ordered that they be supplied with witness statements but the statements were not issued to them. They told the court that they had not received the statements on 31st July, 2006. The hearing proceeded on 5th December, 2006 and the petitioners informed the court that they had been given the wrong statements after PW1 had testified. No statements were issued to them. The petitioners rely on the cases of **JAPHET JUMA HENZO V REPUBLIC Mombasa Criminal Appeal No. 96 of 2007** where the High Court reduced a death sentence to 10 years imprisonment. They also cited the case of **YUSUF CHAMOSI ALI alias BROWN V REPUBLIC, Mombasa Criminal Appeal No. 219 of 2009 where the court reduced the offence of robbery with violence to simple robbery. There is also the case of FREDRICK OKOTH OKUMU V REPUBLIC, Homa Bay Criminal Appeal No. 26 of 2014** where the court ordered a re-trial since the accused were not issued with witness statements.

It is further submitted by the petitioners that their petition is not based on the finding of new and compelling evidence but on the breach of their fundamental rights. The petition is based on how the entire case was conducted and their prayer is that the case be re-heard as provided under Article 50 (6).

The state opposed the application. Mr. Alenga, prosecuting counsel, submitted that the petitioners are misusing the court process. The issues being raised are frivolous. The issue of witness statements did not arise during the trial. All the issues being raised were dealt with by the other courts.

I have gone through the entire record of the trial court. It is true that the petitioners raised the issue of witness statements on 31st July, 2006 and 28th August, 2006. On 27th September, 2006 Mr. Muthami Advocate appeared for Micah Mangwale, the first petitioner herein who was the first accused before the trial court. Mr. Muthami informed the trial court that he wanted the matter to be adjourned as he needed time to read the statements having just been instructed. The matter was adjourned to 1st November, 2006 for hearing and was to be mentioned on 12th October, 2006. PW1 testified on 5th December, 2006 and was extensively cross-examined by Mr. Muthami Advocate and the second petitioner Dennis Mwambela. The issue of witness statements only appeared again on 19th January, 2007 when Mr. Muthami sought adjournment on the ground that there was confusion on the witness statements. That issue never resurfaced and the case proceeded throughout. All the ten (10) witnesses were cross examined by Mr. Muthami and the 2nd petitioner.

The record of the trial court shows that witness statements were provided. The fact that there was confusion on the witness statements does not amount to non-provision of the statements. None of the petitioners raised the issue again. Counsel for the 1st petitioner never complained that he had not been supplied with the statements. On his part, the second petitioner continued to cross examine the witnesses and never complained that he had no witness statements.

The petitioners contend that their rights were violated. The petitioners had the advantage of being heard by the High Court and Court of Appeal but did not raise any issue of their rights. Article 22 of the Constitution cannot be used to enforce the alleged violation of the petitioners rights and have the case re-heard or the petitioners released from prison.

Article 50 (6) of the Constitution states as follows: -

“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.

The wording of Article 50 (6) is that for the court to order a new trial, there must be new and compelling evidence. Article 50 (6) (a) and (b) should be read together. Article 50 (6) (a) on its own cannot lead to the court ordering a re-trial. The word “**and**” under Article 50 (6) (a) brings in the main requirement for ordering a re-trial under Article 50 (6) which is the availability of new and compelling evidence.

The petitioners should understand that any alleged violation of their rights cannot lead to a re-trial or their release at this stage without the availability of new and compelling evidence. The case of **FREDRICK OKOTH OKUMU** (supra) was dealt with at the first appeal when the High Court noted that the trial was not fair. However, if issues of violation of an accused’s rights are not raised at the first or second appeal, any application by way of petition being brought to the High court would be an afterthought and an abuse of the court process. The petitioners herein were represented by counsels in both appeals. They had all the time to raise the issue of violation of their rights. This is simply an abuse of the court process. The judgement of the court of appeal was delivered on 20th March, 2015 and this petition was filed less than three months later on, 30th June, 2015.

There was no violation of the petitioners’ constitutional rights. The petition is an afterthought. It lacks merit and is hereby dismissed.

Dated and delivered in Malindi this 15th day of November, 2016.

S.J. CHITEMBWE

JUDGE