



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CRIMINAL APPLICATION NO.25 OF 2016

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT
PRACTICE AND PROCEDURE RULES 2006 ARTICLE 262 (19) OF THE TRANSITIONAL
AND CONSEQUENTIAL PROVISIONS**

AND

IN THE MATTER OF ARTICLES 21 (1& 4), 22 (1) (3) C, 23 (1&2)

AND

IN THE MATTER OF ARTICLES 26 (1 &3), 27 (1&2), 29 (A, D, F), 48, 50 (2), B, C, (6a &6b)

AND

IN THE MATTER OF SECTIONS 322 (2), 296(2) OF THE PENAL CODE

BETWEEN

ROBERT OBARA LANG'O.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

- 1. ROBERT OBARA LANGO** (the petitioner) has filed a petition under the Constitutional Provisions being **Articles 21 (1& 4), 22 (1) (3)C, 23 (1&2), 26 (1 &3), 27 (1&2), 29 (A, D,F), 48, 50 (2), B, C, (6a &6b)**.
2. He is currently a convict on death row after the 7 years imprisonment imposed upon him by the trial court was overturned and enhanced to death sentence by judges of the 1st appellate court sitting at Homa Bay.
3. He contends that the mandatory death sentence imposed upon him was bad in law and was not supported by the evidence on record. Incidentally the petitioner had been charged with the offence of robbery with violence contrary to **Section 296 (2) Penal Code** and an alternative charge of handling stolen property contrary to **Section 322 Penal Code**.

4. The subordinate court convicted him on a charge of handling stolen property, but upon hearing the appeal, the judges were persuaded that the evidence disclosed an offence under **section 296 (2) Penal Code**, hence the conviction and sentence.

5. The petitioner deposes that his trial was riddled with malice and prejudice and that the evidence presented to court was not conclusive and that the charge was improperly placed as he was charged under the punishment section.

6. He now prays that this court declares that his initial trial, conviction and enhancement of sentence by the 1st Appellate court was a mistrial and a breach of his constitutional rights, so he should be released unconditionally.

7. He stated that he had now obtained new and compelling evidence to demonstrate that the Safaricom credit cards as presented by PW1 and PW2 did not prove that PW1 was robbed. He explains that this is because the card's serial numbers were not subjected to exhaustive scrutiny and there were certain disparities.

8. At the hearing, the petitioner relied on his written submissions wherein he argued that he was convicted and sentenced to serve an unlawful sentence. He argues that the death sentence goes against the letter and spirit of **Article 26 (1) and 3** – which recognises the right to life and also **Article 50 (2)** which provides for the right to a fair trial.

9. He pointed out that **Section 296 (2) Penal Code** is the punishment section and simply defines what constitutes robbery with violence. He maintains that he should have been charged under **Section 295** which creates the offence. It is on this basis that he argues that the charge sheet was defective.

10. The petitioner has then revisited the evidence presented at the trial to fault the decision by the appellate court to enhance his sentence and the trial court for the conviction on the charge of handling stolen property. He refers to the evidence about the Safaricom cards saying the court did not properly scrutinise the evidence. He contends that the cards and money recovered from him did not belong to the complainant.

11. As regards the death sentence, it is his contention that this violates the right to life guaranteed by **Article 26 (1) and (3)** of the **Constitution of Kenya**.

12. In opposing the petition, Mr. Oluoch on behalf of the DPP submitted that:-

1. The charge sheet was properly framed and in adherence to provisions of the Criminal Procedure Code 2nd Schedule page 147. That schedule provides inter alia a summary of offence under the Penal Code, the section creating the offence and the punishment under the Penal Code. The section lists Robbery with violence as an offence under **Section 296(2)** of the **Penal Code**.

13. I have read the provisions of **Section 296 (2) Penal Code** – indeed this provisions has been the subject of contentious interpretations – does it create an offence, or does it provide the penalty. See **SIMON MATERU MUNIALU –VS- R [2007] e KLR (Criminal Appeal No.302 of 2005)**, also **JOSEPH ONYANGO OWUOR & ANOTHER –VS- R [2010] e KLR**. I think it does both – simultaneously. It provides as follows:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person”

14. That is the offence described and created, and there is no illegality or misplaced preference in charging an accused person under that section. The punishment comes at the tail end of that section.

“...he shall be sentenced to death.”

15. I therefore hold that the petitioner’s argument on that limb is without basis. The petitioner has requested that the court finds he was not accorded a fair trial saying both the trial court and the appellate court did not adequately analyse the evidence. He has sought to rely on **Article 50 (2)** of the **Constitution of Kenya** which provides details on the right to a fair trial.

16. In opposing this limb Mr. Oluoch submits that it is incumbent upon the petitioner to show how his right to a fair trial was violated. He argues that if such violation had indeed occurred, then the court that heard his appeal could have made appropriate orders.

17. **Article 50 (2)** addresses various aspects on the right to a fair trial. The petitioner appears to specify the aspect of a fair trial which was violated as the presumption of innocence which he seems to clutch on with regard to the manner in which the charges was drawn? If that is the case, then I have already addressed the issue in the earlier part of this ruling. There was no presumption of guilt before the trial begun.

18. The petitioner also challenged the legality of the death sentence saying it is a violation of his rights under **Article 26 (1)** of the **Constitution** which recognizes the right to life. On this limb, Mr Oluoch submits that the death sentence is a lawful punishment under the law and forms part of an exception to the right to life guaranteed under **Article 26 (3)**. Counsel has referred this court to the Court of Appeal decision in **JOSEPH NJUGUNA MWAURA & OTHERS –VS- REPUBLIC – CRIMINAL APPEAL NO.5 OF 2008**, where the Court of Appeal stated:-

19. The penalty under **Section 296 (2)** is couched in mandatory terms, and the court cannot depart from it and give it a different meaning from what the legislators intended.

20. The right to life under Article 26 of the Constitution of Kenya 2010 has been fashioned in a specific manner to provide or include specific circumstances where life is limited, that is, to the extent it is provided by law.

Article 26 of the Constitution provides:-

“26 (1) – Every person has the right to life

(2) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.”

21. In this instance, the written law is the Penal Code **Section 296 (2)** which creates an offence known as Robbery with Violence and also provides for a penalty of death.

22. Certainly in the recent past the High Court sitting as a bench of three in **PETITION NO. 618 OF 2010- JOSEPH KABERIA KAHINGA AND OTHERS –VS- ATTORNEY GENERAL** expressed strong views regarding the unconstitutionality of the death sentence.

23. Indeed I have the same views and agree that the case of **GEOFREY NGOTHO MUTISO –VS- R. (2010) e KLR (CRIMINAL APPEAL NO.17 OF 2002)** had developed very progressive jurisprudence on the unconstitutionality of the death sentence as a mandatory penalty, but this was demolished by the subsequent Court of Appeal decision in **JOSEPH NJUGUNA MWAURA AND OTHERS –VS- R. (Supra)**.

24. Until such a time that the issue is fully settled, then I think the findings given by the Court of Appeal must prevail – that limb of the petition also fails.

25. The petitioner also questioned the High Court’s decision to enhance the sentence meted out. On this limb, Mr. Oluoch submitted that where evidence discloses an offence under **Section 296 (2)** and the trial

magistrate wrongly convicts under **Section 296(1)** or even on lesser offence, the High Court or Court of Appeal acting *suo motu* or on application by the prosecution can enhance and rectify such error (see **Section 364** of the Criminal Procedure Code on power of the High Court on revision of sentences) – also see the case of **JOHANA NDUNGU –VS- R – CRIMINAL APPEAL NO.116 OF 1995 (MSA)**.

26. I need not belabour the point – the court acted properly and if the petitioner is dissatisfied with that finding by the High Court 2 Judge bench, then his option was to lodge an appeal before the Court of Appeal.

27. Finally the petitioner has invoked the provisions of **Article 50 (6)** to argue that the court should order for a retrial. **Article 50 (6)** provides as follows:-

“6. A person who is convicted of a criminal offence may petition the High Court for a new trial if –

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 the appeal was allowed; and

b) New and compelling evidence has become available.

28. It is not clear to me whether an appeal was lodged in the Court of Appeal as the petitioner makes no such reference, or whether he failed to file such appeal within the period required.

29. Whatever the case I agree with Mr. Oluoch that it is incumbent on the petitioner to disclose the new and compelling evidence he has to warrant reopening his case. Unfortunately what he has done is to revisit the same evidence that was presented at the trial and before the High Court, and try to poke holes at it, with a view to finding fault in the respective court’s findings. I do not think that is what is envisaged by **Article 50 (6)**, and I find that he has failed to satisfy the requirements therein.

30. Consequently I hold that the petition has no merit and is dismissed in its entirety.

Delivered and dated this **2nd** day of **November, 2016** at Homa Bay.

H.A. OMONDI

JUDGE