



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC. APPLICATION NO. 28 OF 2016

SHABAN JUMA alias SANDE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, Shaban Juma alias Sande has filed a constitutional petition before this Court alleging that his fundamental rights as entrenched in the Constitution have been infringed. Through an oral application made in Court he asked for provision of counsel at the State's expense to assist him prosecute his petition on the ground that he is not in a position to prosecute the same as he does not understand the law.

2. Mr. Owiti for the State urged the Court to appoint counsel for the Applicant stating that Applicant's petition raises questions of infringement of fundamental rights and lack of legal representation may occasion substantial injustice to the Applicant.

3. It is important to bring to the forefront the fact that the Applicant is currently detained at the President's pleasure having been convicted by a magistrate's court for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. His appeals to the High Court and the Court of Appeal were rejected after the two appellate courts concluded that his conviction was safe. The Court of Appeal, however, found that he had committed the offence when a minor and the sentence of death imposed by the lower Court and confirmed by the High Court was unlawful hence the substitution of that sentence with an order directing that the Applicant be detained at the President's pleasure.

4. Article 50(2)(h) of the Constitution provides that a fair trial includes the right **“to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”**

5. Pursuant to that constitutional provision, Parliament enacted the Legal Aid Act, 2016 (“LAA”) which according to the preamble is:

“AN ACT of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes.”

6. Under Section 5 there is established the National Legal Aid Service (“the Service”) whose functions includes the establishment and administration of a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; facilitation of the representation of persons granted legal aid; assignment of legal aid providers to persons granted legal aid; and administration and management of the Legal Aid Fund.

7. Section 36 of the LAA provides the eligibility criteria for legal aid as follows:

“36. Persons eligible for legal aid

(1) A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is-

- a) a citizen of Kenya;**
- b) a child;**
- c) a refugee under the Refugees Act (No. 13 of 2006);**
- d) a victim of human trafficking; or**

e) an internally displaced person; or

f) a stateless person.

(2) A person who is eligible to receive legal aid services under subsection (1) shall apply to the Service in the prescribed manner.

(3) A person shall not receive legal services unless the Service has determined that the individual's financial resources are such that the person is eligible for the services.

(4) Despite subsections (1), (2) and (3), the Service shall not provide legal aid services to a person unless the Service is satisfied that-

(a) the costs of the proceedings is justifiable in the light of the expected benefits;

(b) resources are available to meet the costs of the legal aid services sought;

(c) it is appropriate to offer the services having regard to the present and future demands;

(d) the nature, seriousness and importance of the proceedings to the individual justify such expense;

(e) the claim in respect of which legal aid is sought has a probability of success;

(f) the conduct of the person warrants such assistance;

(g) the proceedings relate to a matter that is of public interest;

(h) the proceedings are likely to occasion the loss of any right or the person may suffer damages;

(i) the proceedings may involve expert cross-examination of witnesses or other complexity;

(j) it is in the interest of a third party that the person be represented;

(k) denial of legal aid would result in substantial injustice to the applicant; or

(l) there exists any other reasonable ground to justify the grant of legal aid."

8. Any person desirous of accessing legal aid is supposed to apply to the Service. However, Section 43 places certain duties on the court as follows:

"43. Duties of the court

(1) A court before which an unrepresented accused person is presented shall-

a) promptly inform the accused of his or her right to legal representation;

b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

c) inform the Service to provide legal aid to the accused person.

(2) The Service shall provide aid to the accused person in accordance with this Act.

(3) Where a child is brought before a court in proceedings under the Children's Act (No. 8 of 2001) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation to the child.

(4) Where an accused person is brought before the court and is charged with an offence punishable by death, the court may, where the accused is unrepresented, order the Service to provide legal representation for the accused.

(5) The provisions of legal representation under sub-section (4) shall be subject to the criteria of eligibility of legal aid under this Act.

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person."

9. Even though the courts have been given power to inform the Service to provide legal aid to an accused person, everything points to the fact that the onus of assessing whether an accused person is entitled to legal aid belongs to the Service. Any attempts by the court to determine whether an applicant is deserving of legal aid will require the applicant to submit certain information to court and such information may be prejudicial to the applicant's case. The court is also expected, without the benefit of any evidence, to form an opinion as to whether an applicant's case is likely to succeed. The constitutional requirement for provision of legal aid in certain cases is not unique to Kenya. South Africa which has a similar constitutional provision has deemed it fit to leave the assessment of eligibility for legal aid to the body created by statute for that purpose – see **Legal Aid Board v the State & 2 others, Supreme Court of Appeal of South Africa Case No. 363 of 2009**.

10. The importance of allowing the Service to determine whether or not an applicant is deserving of legal aid services was explained in the cited South African case thus:

“We need hardly to remind ourselves that courts do not control the public purse, nor do they have the power to conscript the legal profession to render services without reward. It is for the other arms of government to ensure that adequate provision is made for legal representation at State expense. Here they have chosen to do so through the LAB. Demands other than legal aid on the public purse may limit the availability of funds. Courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government. As O'Regan J puts it: ‘A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts’. The LAB is undoubtedly one such institution. The legislature and executive need to appreciate, however, that if the limitation of available funds for legal representation at State expense is too severe the administration of justice will unquestionably suffer and with it our constitutional order.”

11. Mr. Owiti for the State did suggest that an order should issue to the Deputy Registrar of this Court to appoint counsel at the State expense for the Applicant. From what vote is she expected to pay such counsel? All State organs operate on a budget and where an activity is not budgeted for it cannot be carried out. In the case of **David Njoroge Macharia v Republic [2011] eKLR**, the Court of Appeal held that persons accused of committing capital offences have a right to legal representation at State expense. The Court, however, noted that the decision had major policy and financial implications and directed the Deputy Registrar of that Court to serve the Attorney General and others with a copy of the Judgement for their records and necessary action. I find that ordering the Deputy Registrar in this case to appoint counsel for the Applicant would be a pointless exercise as there are no funds allocated for that purpose.

12. It is also important to note that the question as to whether the Applicant is indeed an accused as envisaged by Article 50(2)(h) of the Constitution has to be determined in this particular case as at the moment the Applicant is not facing any criminal trial. I am, however, alive to the fact that Section 37 of the LAA envisages availability of legal aid services in some civil matters. Considering what I have stated above, I hold that the Service is the best body to handle an application for legal aid. I say so notwithstanding the fact that this Court can direct the Service to provide counsel to an accused person. According to me, where the court has directed provision of legal aid, the operational independence of the Service will be best assured if the Service is left to make the decision. In doing so, it must of course take into account the court's directive. It should always be remembered that it is only the Service which knows how and where to spend its budgetary allocation for optimal results.

13. The LAA was assented to on 22nd April, 2016 and its commencement date is indicated as 10th May, 2016. Mr. Owiti for the State was not sure whether the Service is already established. I do not think this is a major issue as in this particular case the Applicant is lawfully incarcerated and can wait for the establishment of the Service if that is yet to happen.

14. It is important to state that in this matter I have intentionally avoided considering whether the Applicant is indigent and, if so, whether substantial injustice will be occasioned to him if he is not given legal aid. I have done so because I believe that carrying out those tasks would amount to encroaching on the Service's statutory territory.

15. Whatever the case, an assessment of the Applicant's eligibility for legal aid will not result in a just and fair decision as his application is so bare. There is no material upon which to determine whether he is indigent. He has also not explained how substantial injustice would occur if counsel is not appointed for him. Where the law does not compel the provision of legal aid at the State expense, the onus is on the applicant to justify entitlement. This does not however rule out situations where the court of its own motion or the Service decides that the particular circumstances of a given case requires provision of legal aid.

16. The conclusion I reach is that at this point in time the Applicant's application for legal aid is unmerited. The application is therefore dismissed. The best I can do for the Applicant, and he is at liberty to decide otherwise, is to suspend the hearing of his petition pending the outcome of his quest for legal aid.

Dated, signed and delivered at Busia this 10th day of Nov., 2016.

W. KORIR,

JUDGE OF THE HIGH COURT