



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL PETITION NO. 1 OF 2015

GEORGE NG'ANG'A MAINA.....1ST PETITIONER

RAPHAEL GURIU MAINA.....2ND PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

INTRODUCTION

The Petitioners filed this Petition dated 2nd February 2015 seeking declaration that; an order be issued to declare the Post Mortem form that was produced at the trial court was in breach of section 77(1) and 80(1) of the Evidence Act and that the court should declare the same not to be authentic document, the evidence of the pathologists is in breach of Section 386(2) of the Criminal Procedure Code and Section 77(1) and 80(1) of the Evidence Act and should be revoked and nullified as they were not accorded a fair hearing as per the Constitution of Kenya under Articles 25(c), 50(2)(e)(j) and (k), 35(2) and 50(4). The Petition was accompanied by a verifying affidavit

The Petitioners together with others now not before court (who was acquitted for lack of evidence) had been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that the Petitioners murdered John Maina Gacheru at Umoja village in Lamu on 5th December 2004 at about 6 pm. The matter proceeded to full hearing and the Petitioners herein were convicted and sentenced to death by the High Court in Malindi. They appealed to the Court of Appeal in Mombasa and the court upheld the conviction.

The Appellants at the time of moving this Court were being held at the Bungoma G.K Prison. This Petition is brought pursuant to the new Provision of the Constitution Of Kenya 2010 mainly Articles,20(1), 22(1),23(1) &(3), 25 (C),27(1) & (2), 28, 33 (a)& (k),35(1) (a) &(b),47(1) & (2), 48, 50(2),(c),(j),(k), and 259(1),and Sections 77(1), (2) & (3), 80(1) of the Evidence Act. They state that were dissatisfied with the investigations, trial process and the death sentence imposed on them. They seek to have this Court exercise the authority conferred upon it by Article 259 of the Constitution.

THE PETITIONERS' CASE

The Petitioners in the Petition before Court, allege that they were unlawfully charged. They take issue with the Post Mortem report which they state was not prepared well and did not disclose the cause of

death. They allege that Section 386(1) of the CPC was grossly violated since as per the findings of the Investigation Officer the cause of the death was not yet established, yet they were charged and their trial commenced. That the records did not indicate that the deceased was transferred from Mpeketoni sub-district hospital to Lamu hospital and that this breached section 386(2) of the CPC. That the Post Mortem report lacked vital information, such as the name of the person who conducted it and the seal and stamp of the officer who performed the test in breached section 80(1) of the Evidence Act. They thus seek to be accorded a fair hearing under Article 50(4) of the Constitution.

At the hearing the Petitioners submitted on two issues; the authenticity of the Postmortem report and the sentence. On the Postmortem report they submitted that the evidence of the PW5 who is the doctor, was fabricated, as there was no relationship between the information In the report and the details in the OB. They argued that this piece of information is new and compelling evidence that was not within their reach at the time of trial, that the lawyer who represented them ignored their defence , they did not have the Post mortem report that was done at Mpeketoni, they further submitted that the dates that the post mortem was done differed. That the OB gave date of death as died on 5th December, while the postmortem was done on 9th December, and it was indicated that the deceased had died less than 6 hours before.

As regards the sentence the Petitioners submitted that they were not accorded a chance to mitigate, that they mitigated after conviction, under the new Constitution Article 23 the court is required to issue an appropriate sentence. That they did not prepare to kill and that they protected the deceased from day time to 6 pm in the evening.

In replying to the states response they argued that the evidence of PW5 stated that the deceased was a habitual thief. They referred the court to the case of Thomas Cholmondeley criminal appeal no. 116 of 2007 where the court held that the prosecution had a duty to bring all relevant documents to court.

THE RESPONSE

The state opposed the Petition by way a replying affidavit to the effect that the postmortem produced as evidence clearly stated the cause of death was massive hemorrhage. That variation in hospitals where the postmortem was conducted does not vitiate the fact that the deceased had been murdered. That neither the petitioners nor their advocate raised the issue of authenticity of the Post mortem report at the trial, the petitioners failed to raise the issue of the postmortem at the appeal stage , the court of Appeal upheld the decision of the trial court and that raising it now is an afterthought to defeat justice.

The state submitted that the application is misplaced, it is a nullity and an afterthought. That the petitioners' had a right to relevant evidence but did not seek for it. That the issues being raised in this petition should have been raised during the trial or appeal. That the Post mortem referred to does not vitiated the fact that the deceased was murdered. Neither is there evidence on record to state that the deceased was a habitual thief. That they had counsel on record who should have had the evidence they purport to be new and questioned why they are raising the issue now.

On sentencing the state submitted that the Petitioners were found guilty the Court meted a mandatory sentence and no mitigation was needed. The state went on to submit that the application was malicious and urged court to dismiss it.

ISSUES FOR DETERMINATION

Having considered the Petition its supporting affidavit and the response by the state including authorities cited the issues for determination are:-

- a. Whether the Petitioners have raised near and compelling evidence so as to allow this court to invoke Article 50(b) of the Constitution 2010
- b. Whether lack of mitigation is a ground to allow Article 50(b) of the constitution to apply

DETERMINATION

The Petitioners' case is that the post mortem report that was relied upon by the trial court was not authentic. It gave the wrong name of the hospital that the same was carried, the doctors name was not given nor was the same sealed. The said report gave a date that conflicted with the death of death, the trial court did not allow the litigants to mitigate against death sentence.

Article 50(6)(a) of the Constitution provides:-

“(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 allowed for appeal.”**

Article 50(6) (b) provides:-

- b. **and new and compelling evidence has become available.”**

The requirements of the law is clear, the applicant must have appealed to the highest court. Which is the case in this instance, The circumstances of this case the highest court was the court of appeal, or time within which to appeal has lapsed and there is discovery of new and compelling evidence. The Petitioners meet the first limb. They appealed to the court of appeal and there appeal declined. Do they have new and compelling evidence? They attack the postmortem report as follows;

“ ..charged, tried and convicted with the evidence of postmortem form that its authenticity is questionable since it does not bear the name of the author nor the stamp”

In their oral submissions the Petitioners contend that they discovered new evidence after the trial to the effect that the deceased Post mortem was done at Mpeketoni sub district hospital by a clinical officer and not PW5 the doctor from Lamu who testified. That the doctor’s evidence did not relate to the deceased as the deceased died on the 4th yet the Postmortem done on 9th gave time of death as less than 6 hours before. The Petitioners have not made available any other postmortem report.

The issue of mitigation was raised as well.

From the onset I wish to consider the second issue and to determine whether the same can actually form a ground under Article 50(b) for a fresh trial to be ordered. The petitioners in their arguments cited the case of *Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008)* where the Court of Appeal was of the view that the death penalty was not the only punishment for murder and the court allowed convicted persons to mitigate to arrest the death sentence. However the same court was of a different opinion in *Joseph Njuguna & 2 Others v Republic[2013] eKLR (Criminal Appeal No. 5 of 2008)* Court the held that:-

“ As judges, our mandate is fidelity to the Constitution and to the law. We cannot interpret the Constitution and other statutes whimsically where no discretion or window has been provided. 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 provided by law.

In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spitfire and gaffe letter of the Penal Code and Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.

We hold that the decision in *Godfrey Mutiso v R* to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading the law shows that the offences of murder contrary to section 203 as read with 204 of

the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to Section 296(2) of the Penal Code and attempted robbery with violence contrary to section 297(2) of the Penal Code carry the mandatory sentence of death.”

From the two case quoted above it appears that the opinion of the said court is divided and for now it depends on the opinion of the judge hearing a matter. In any event aggrieved party can raise the issue on appeal if dissatisfied with the trial court in that regard. This matter however needs to be settled once and for all at the right forum so that the position in law is clear. However for purposes of the matter before court this cannot be said to be evidence new and compelling to attract the provisions of Article 50(b)

The supreme court in the case of **TOM MARTINS KIBISU VS REPUBLIC (2014)** eklr made the following observations,

“New evidence means evidence which was not available at the time of trial and which despite exercise of due diligence could not have been availed at the trial”

“ Compelling evidence constitutes evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict Acourt considering whether evidence is new and compelling for a given case, must ascertain that it is prima facie , material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against an accused person”

The Petitioners have no new Post mortem report to counter the one produced during trial. The report of the police being relied upon to introduce new evidence is not certified, although it indicates that the Postmortem was done at mpeketoni, and hence the assertion that it was not in Lamu and therefore the postmortem was doctored, this alone cannot alter the verdict as there were eye witnesses who saw the Petitioners assault the deceased who immediately thereafter died.

The above authority defines when new evidence is compelling, It must be capable of affecting the outcome of a case.

My considered opinion is that, the fact that the report had no seal and was signed is not new. The report had all these so called “issues” but the same were not taken up at trial or appeal. And on the face of the other evidence on record the issue being raised in regard to the Postmortem report cannot be said to be fatal. There is overwhelming evidence of the Petitioner’s involvement in the assault that led to the death of the deceased and therefore the evidence being sought to be produced may in any event not change the verdict or sentence.

Consequently the Petition fails.

Dated at Bungoma this 2nd day of October 2015.

ALI-ARONI J

JUDGE