REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MISC. APPLICATION NO.36 OF 2011

BETWEEN

CALEB NYANGAU MANYIZA ……..……..……. APPLICANT

AND

REPUBLIC ……..……. RESPONDENT

REASONS FOR THE JUDGMENT

Introduction

1. On the 21st November 2013, I delivered judgment dismissing the applicant's application for retrial. I reserved the reasons for the judgment to 20th December 2013, but due to a wild cause list brought about by the fact that the court has, since October 2013 been handling the workload for two courts, the deadline of 20th December 2013 could not be met. The court regrets the delay which was due to circumstances completely beyond its control.

2. The Applicant herein, Caleb Nyangau Manyiza is seeking a new trial of his murder case. The application is made mainly pursuant to **Article 50 (6)** of the **Constitution** which provides as follows:-

"50(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; and

(b) new and compelling evidence has become available.

3. The applicant was arraigned before court on one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code** vide an information dated 1st March 2000 in which it was alleged that on the 12th day of July 1999 at Kiobegi sub location in Gucha District within Nyanza Province, he murdered Norah Nyangucha Nyamache. He pleaded not guilty to the charge.

4. The applicant who was represented by Mr. Kerosi Ondieki, was tried by Hon. I.C.C. Wambilyangah J (now retired) in Kisii High Court Criminal Case No. 23 of 2000, found guilty, convicted and sentenced to suffer death as by law provided. Being dissatisfied with the conviction and sentence, the applicant preferred an appeal to the Court of Appeal vide Criminal Appeal No.7 of 2007. The Court of Appeal, after hearing arguments, dismissed the appeal on both conviction and sentence. The appeal to the Court of Appeal was dismissed on 11th March 2005.

The Murder Story

5. From the evidence on record, the deceased in this case was a girl aged about 3 years and 8 months, and was a daughter to James Nyamache Mabiria (PW4) and Robina Kemunto (PW1). The facts of the case as gleaned from the testimony of PW1 are that on 12th July 1999 at about 9.00 a.m. PW1 went to her shamba which was about a kilometer away to harvest finger millet. She took the deceased with her, but because of her tender age, the deceased played around as PW1 went about her work. PW1 was working together with Nyabonyi Nyamache who testified as PW6, and Jacquiline Ericha, PW8. They worked in the shamba until 6 p.m.

6. Kemunto Nyamache, PW5 testified that on the same 12th July 1999 at

about 1.00 p.m., she left the school where she was a pupil to go home for lunch. When PW5 arrived at home, she found the deceased and the applicant at home. PW5 made a meal of ugali and served some of it to the applicant and the deceased who ate it outside the house. From PW5's testimony, the applicant was a neighbour to PW5's parents and had also been employed to do some work in the home. PW5 said the applicant was well known to her.

7. PW5 stated further that at around 7.00 p.m., PW4 James Nyamache Mabiria and PW1 went to the home of PW5 asking if the deceased was in their home, and after being told that she was not, the parents of the deceased carried out a concerted search for the deceased. On the 13th July 1999, the body of the deceased was recovered from a shallow pit in a shamba which was not far away from the one where PW1, PW6 and PW8 harvested millet from on 12th July 1999.

8. Following the discovery of the body of the deceased on 13th July 1999, the applicant was arrested and taken to Nyangusu police post. On the 14th July 1999, the applicant appeared before the OCS of the station, one Chief Inspector Charles Kamito, PW11, for purposes of cautioned statement under inquiry. According to the testimony of PW11, the applicant after being duly cautioned voluntarily gave a statement in which he admitted to having killed the deceased in the course of his sexual defilement of the child.

9. During the trial, the court held a trial within a trial after the applicant denied that he voluntarily gave a statement admitting to have killed the deceased. After the trial within a trial, the trial judge admitted the lengthy statement by the applicant in which the applicant admitted that the deceased died while the applicant enjoyed the intense pleasure of defiling her. PW12, Inspector Charles Korotoko also produced in court, without the same being objected to, a caution statement made by the applicant admitting that he killed the deceased under the circumstances described in the statement under inquiry given to PW11 by the applicant.

10. At the close of the prosecution case, the applicant was put on his defence. He denied the charge and offered a defence of alibi, saying that on 12th and 13th July 1999, he was at a funeral. He stated that on the 13th July 1999, while at the said funeral he heard that people were looking for a missing child. He also stated that when he joined the villagers in an effort to find out what was happening, some relatives of the deceased struck him, saying he was the one who had killed the child. The applicant was rescued from the hand of mob-justice and escorted to the Senior Chief of the area and later to Nyangusu police post.

11. During his unsworn testimony before the trial court, the applicant told the court that he was tortured while in police cells and coerced to admit that he had committed the offence. He also stated that he was forced to sign the statement under inquiry but that the contents of the said statement were unknown to him. The trial court noted that throughout the trial, the applicant never questioned the circumstances under which the charge and caution statements was recorded from him by PW12. For the reason that the applicant did not question the circumstances under which the charge and caution statements were taken, the trial judge concluded that the denial by the applicant from the dock was false.

12. After considering all the evidence that was on record, the trial court was satisfied that the prosecution had proved its case against the applicant beyond any reasonable doubt. He therefore held that the applicant killed the deceased in the course of ravishing her.

13. In its judgment dated 11th March 2005, the Court of Appeal, after carefully reconsidering and evaluating the evidence afresh, found that there was sufficient evidence upon which a finding of guilty could be entered, even in the absence of the statement under inquiry. The Court of Appeal therefore made a finding that the applicant was properly convicted. The appeal was thereby dismissed.

The applicant's case

14. The applicant's case before me is premised on the various provisions of the **Bill of Rights – Chapter Four** and in particular **Article 50 (6)** thereof (supra). It is also premised on **Article 262**. The applicant contends that he was dissatisfied with the manner in which he was treated by the police and also with the manner in which the trial court handled the entire case. He also contends that the Court of Appeal erred in upholding the mandatory death sentence since under **Article 26 (1)** of the **Constitution**, he is entitled to life. He also avers that as a citizen of this country, he is entitled to enjoy the rights and fundamental freedoms guaranteed by the Constitution and that the mandatory death sentence meted out to him was excessive. He also questions the President's decision to commute the mandatory death sentence to life imprisonment, a decision he says was taken in an arbitrary manner.

15. In the earlier petition dated 6th June 2013, the applicant prays for orders that:-

a) The respondent be ordered to release him on grounds that he has served 15 years in prison.

b) A declaration that the sentence of death imposed upon him and subsequently commuted to life imprisonment by president was arbitrary.

c) His case be remitted to the High Court (the original trial court) so that he can have a fresh trial.

d) A declaration that section 204 of the Penal Code is inconsistent with the constitution of Kenya Articles 26 (1) and (3), 50 (2), (h) & (p) of the 2010 Constitution.

e) Such other relief as the court may feel appropriate and just to grant.

The Submissions

16. When the matter came before me on 29th September 2013 the petitioner handed in additional submissions and stated that:-

a) In the trial court his case commenced at 4.30 p.m. and proceeded up to 6.00 p.m. which were hours that courts do not normally sit.

b) His case was heard in chambers, this was not a public hearing culminating to a plan to frustrate his efforts to a fair hearing.

c) The judge who heard him was extremely biased by leaving out important facts of the case for the benefit of the prosecution.

d) During the hearing of his case there were 2 witnesses whose names were the same and they were in court when the case was going on and the court did not disqualify the witness who was in court.

e) His advocate seemed to have only been interested in being paid and he abandoned him before the case was concluded.

17. Concerning the Court of Appeal decision, the applicant contended that the court simply adopted the findings of the trial court instead of making its own findings in the matter. He also contends that the President had no business commuting the death sentence to life imprisonment, because he believes that sentencing is a matter for the judiciary and not for the Executive.

18. The applicant submits that this court has the jurisdiction to determine this application in his favour in accordance with **Article 50 (6)**. The applicant further says that he intends to call 3 witnesses during the fresh trial all of whom will testify to the fact that he was tortured while in police cells. He also says he will be seeking to have the OB as well as the Kisii Main Remand Prison Register Admission Book for 28th and 29th March 2001, though he does not say what information the said documents will have or have that will be or is of help to his case.

19. The applicant avers that it is in the interest of justice that this case be heard afresh.

20. Mr. Shabola for the respondent opposed the petition and submitted that:-

a) Article 50 of the Constitution provides for option of retrial upon appeal being dismissed by highest court and when there is new and compelling evidence.

b) The petitioner has not indicated to the court whether he has any new and compelling evidence, and that his complaints are only against procedure used in handling him during trial and the fact that there are 3 witnesses who can testify about his alleged torture which at police station and that such evidence of torture does not amount to new and compelling evidence as far as the murder charge is concerned.

c) The fact that the trial court was sacked does not mean that the decision the judge made in his capacity as judge is a bad decision as petitioner does not say how the judge might have been comprised while handling the case. In any event, applicant's appeal to the Court of Appeal was dismissed on merit.

d) The fact that death sentence was commuted to life sentence is not an infringement of the applicant's rights.

21. Regarding the death sentence counsel submitted that the death sentence was upheld by the Court of Appeal due to overwhelming evidence and further that the fact that the said sentence was commuted to life imprisonment was a favour upon the petitioner and not an infringement of his rights. That the President is empowered to do so under the law and it cannot be said that Executive is taking over powers of the Judiciary. He further submitted that **Article 28** provides that a person shall not be deprived of his right to life save as provided by the **Constitution** and other written law and that **section 204** of **Penal Code** is the other written law referred to by the Constitution so that the said section cannot be said to be infringing on the rights of the petitioner. He urged the Court to dismiss the petition as it does not give sufficient reasons for a retrial.

22. The petitioner in reply submitted that **Article 26 (1)** guarantees everyone the right to life and still maintained that **section 204** of the **Penal Code** was inconsistent with **Article 26 (1)** of the **Constitution**. He also contended that sentencing is a matter for the judiciary and not for the Executive and that the Court of Appeal closed its eyes to constitutional rights breaches both by the police and the trial court.

23. He further submitted that **Article 50 (6) (a)** gives him the right to appear before this court and he does not have to adduce any fresh evidence before he is heard. He also submitted that the trial judge was sacked due to complaints made against him although the petitioner has not shown that the judge was sacked because of a particular complaint either in this case or in other cases.

Issues for Determination

24. Having set out both the prosecution's and the petitioner's cases, and having heard the contending submissions, the following issues arise for determination:-

a) Whether the Petitioner is properly before this court;

b) If the answer to (a) above is yes, whether the Petitioner is entitled to the reliefs sought pursuant to Article 50 (6);

c) Whether the death sentence imposed upon the Petitioner was/is an illegal sentence.

Findings and Conclusions

Issue (a) – Whether the Petitioner is properly before this Court

25. The Constitution of Kenya, 2010, under which the Petitioner has moved this court was promulgated on 27th August 2010. **Article 263**, which is part of **Chapter Eighteen – Transitional** and consequential provisions – provides that **"this constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier."**

26. **Article 264**, under the same Chapter Eighteen provides that **"the Constitution in force immediately before the effective date shall stand repealed on the effective date, subject to the Sixth Schedule."**

27. It therefore follows from the above that the provisions of the Constitution of Kenya 2010, were effective from the 27th August 2010 save as provided in the Sixth Schedule where there are Transitional and Consequential Provisions with regard to matters therein specified. See **Nairobi JR Misc. Application No.271 of 2011 – Wilson Thirimba Mwangi –vs- The Director of Public Prosecutions** (unreported) and **Joseph Ihugo Mwaura –vs- Attorney General, Nairobi Petition NO.498 of 2009** (unreported), **John Githinji Wangondu & others –vs- Coffee Board of Kenya & another, Nairobi Petition No.255 of 2011** (unreported) as well as **Du Plessis & others –vs- De Klerk & another (CCT/8/95) [1996] ZACC 10)**. The last 3 of the above authorities informed the decision by Majanja J in the **Wilson Thirimba Mwangi case** (above), and I agree with the findings in the said decision.

28. What I am saying here and what the other courts have said is that, where a trial took place under the repealed Constitution, a Petitioner, like in the present case cannot purport to seek a retrial under the provisions of the new Constitution, as no such a right existed under the repealed Constitution. See **Charo Karisa Thioya –vs- Republic – Court of Appeal at Mombasa Criminal Appeal NO.274 of 2002** (unreported). In that case, the appellant had argued that his constitutional rights to a fair trial were breached because he did not have legal representation. The Court held that since no such right existed under the repealed Constitution, there could not have been violation of the same.

29. In the instant case, both the trial and the appeal of the applicant took place under the former constitutional regime, so that even if **Article 50 (6) (a)** of the **Constitution 2010** now gives a person the right to seek a fresh trial where such person's appeal has been dismissed by the highest court to which the person is entitled to appeal, the Petitioner cannot petition this court for a fresh trial because his judgment by the Court of Appeal was delivered on the 11th March 2005, some five and a half years before the promulgation of the Constitution of Kenya, 2010.

Issue (b) – Whether the Petitioner is entitled to the Reliefs sought

30. Having determined that the Petitioner cannot benefit from the provisions of **Article 50 (6) (a)** by reason that his whole trial including the appeal to the Court of Appeal were concluded under the repealed Constitution, I find and hold that he cannot equally be granted the reliefs sought especially the prayers that he be released from prison custody forthwith and a declaration that the sentence of death imposed upon him and subsequently commuted to life imprisonment by the President was both illegal and arbitrary.

Issue (c) – Whether the death sentence imposed upon the Petitioner was/is an illegal sentence

31. The Petitioner submitted very passionately that the death sentence imposed upon him by the trial court was an illegal sentence by dint of the provisions of **Article 26 (1)** of the **Constitution**. He also submitted that the President acted arbitrarily by commuting the death sentence to life imprisonment. The State expressed a contrary view, urging the Court to hold and to find that the death penalty is still on the statute books and is therefore legal. Secondly, counsel for the respondent submitted that the President, in commuting the death penalty to life imprisonment, acted within the law and did not usurp the sentencing powers of the judiciary as alleged by the Petitioner. It is clear from these submissions that the death penalty is one of the hottest issues in Criminal Law and procedure today. It is a matter of ongoing discussion amongst Judges.

32. There are two differing Court of Appeal decisions on the question of whether **Section 204** of the **Penal Code** is inconsistent with the Constitution and in particular with **Article 26** thereof. In the case of **Godfrey Ngotho Mutiso & Others –vs- Republic – Criminal Appeal NO.17 of 2008** (Omollo, Waki and Onyango Otieno JJA), it was held that the law on mandatory death sentence as provided under **Section 204** of the **Penal Code** was unconstitutional for reasons that the provisions completely tied a trial court's hands behind its back when meting out a sentence that does not allow for consideration of any mitigating circumstances.

33. The contrary opinion of the Court of Appeal is found in the case of **Joseph Njuguna Mwaura & others –vs- Republic, Criminal Appeal No.5 of 2013** in which the Court held that without an amendment to change the law as it now stands, **Section 204** of the **Penal Code** was clear in its provisions that **"any person convicted of murder shall be sentenced to death."**

34. Before reaching its decision in the **Mwaura case**, the Court explored in detail the relevant constitutional provisions, including those of **Article 26**, where **sub-article (1)** thereof provides: **"Every person has the right to life."** The Court argued, and quite convincingly in my view, that the provisions of the old Constitutional order made exceptions to the absolute right to life, namely where a person had been convicted of a criminal offence which called for a death sentence. The Court also considered the provisions of **Section 24** and **25 (1)** of the **Penal Code** which provide as follows:-

"24. The following punishments may be inflicted by a court –

(a) death;

(b) imprisonment or, where the court so determines under the Community Service Orders Act, 1998, community service under a community service order;

(c) detention under the Detention Camps Act;

(d) (Repealed by 5 of 2003, S.3.);

(e) fine;

(f) forfeiture;

(g) payment of compensation;

(h) finding security to keep the peace and be of good behavior;

(i) any other punishment provided by this code or by any other Act.

35. Section 25 (1) of the Penal Code reads as follows:-

"25(1) Where any person is sentenced to death, the form of the

sentence shall be to the effect that he is to suffer death

in the manner authorized by law."

36. As the matter stands now, the death sentence which is anchored in Mosaic Law is still on the statute books and though the same may appear outrageous and outmoded, the option is not to discard the law without appropriate amendments to the relevant statutes. My own thinking is that as a court, I should not purport to amend the law in the manner proposed in the **Mutiso case**. However, there is no doubt that there is an urgent need for national debate to discuss the issue and to take appropriate follow-up action in accordance with the Constitution.

37. For the moment, I hold the view that the death sentence is still legal. Consequently and for all the reasons above stated, I dismiss the applicant's application in its entirety by the judgment delivered on 21st November 2013.

38. Orders accordingly.

Dated, signed and delivered at Kisii this 6th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Present in person for Applicant

Mr. P.O. Ochieng (present) for Respondent

Mr. Bibu - Court Clerk