



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**PETITION 1 OF 2012**

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25 (C), 49 (1) a, (B), 6 50(C) 50(J) 50(4) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES 2006, AND PART 5 RULE 19 OF THE SIX SCHEDULE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS , 1958,AMERICAN CHARTER ON HUMAN RIGHTS AFRICAN (BANJUL CHARTER ON HUMAN RIGHTS)**

**AND**

**IN THE MATTETR OF: THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: CHIEF MAGISTRATE (MALINDI) COURT CRIMINAL CASE NUMBER 32 OF 2010 REPUBLIC VERSUS JOHN SAFARI KARISA & HIGH COURT (MALINDI) CRIMINAL APPEAL NO. 81 OF 2011 JACKSON SAFARI KARNA VERSUS THE ATTORNEY GEENERAL**

**AND**

**IN THE MATTER OF: THE PRINCIPAL OF LEGITIMATE EXPECTATION AND FAIRNEESS**

**BETWEEN**

**JACKSON SAFARI KARISA..... APPLICANT**

**V E R S U S**

**RULING**

(1) This Court is asked to consider and determine the Petitioners Chamber Summons dated 3<sup>rd</sup> January 2012 asking, in the main, that the Petitioner be released on reasonable bail terms without sureties or that execution of the sentence or order imposed in **Malindi Criminal Case No. 32 of 2010 (Republic – Vs- Jackson Safari Karisa)** be suspended pending the hearing of this petition. The Summons is brought against the backdrop of a petition filed by the Petitioner challenging the constitutionality of the Criminal proceedings.

(2) In those criminal proceedings the Petitioner was charged with the offence of Trafficking in Narcotic Drugs contrary to Section 4(a) of The Narcotics and Psychotropic Substances Control Act No. 4 of 1994. He was convicted of the offence on 1<sup>st</sup> July 2011 and sentenced to serve a life imprisonment and in addition to a fine of Kshs. 1,000,000/=.

(3) Aggrieved by the conviction and sentence, the Petitioner preferred **Malindi Criminal Appeal No. 81 of 2011 Jackson Safari Karisa –Vs- Respondent**. I am told that the appeal is pending hearing and determination. By a Notice of Motion dated 26<sup>th</sup> July, 2011 brought under urgency proceedings, the Petitioner approached the High Court at Malindi seeking to be admitted to bail pending appeal. That application was rejected by C.W. Meoli, J on 27<sup>th</sup> October 2011.

(4) Although the summons now before court was served on the office of The Director of Public Prosecutions at Malindi, the Respondent never filed any response nor did he participate at the hearing.

(5) In the application, it was argued by the Petitioner that the trial proceedings desecrated his fundamental rights in the following manner:-

(a) Witness statements were not provided to the Petitioner in advance. (Article 50 (2) (j) of the Constitution).

(b) The court did not explain to the Petitioner his right to Counsel (Article 50 (2) (g) of the Constitution).

(c) The state failed to provide to the Petitioner a State paid Counsel to defend him and this right was not explained to him. (Article 50 (2) (h) of the Constitution).

(d) The sentence imposed is disproportionate to the offence committed and is unconscionable.

(6) When Dr. Khaminwa, representing the Petitioner, addressed this Court he argued that these issues were not brought to the attention of Meoli, J in the bail proceedings. But this may not be quite so. The following is part of the address of the Petitioners Counsel before the Judge;

**“We have an arguable appeal. Sentence is unconstitutional and contrary to the principal of proportionality. We rely on R Vs Thomas Cholmondeley. On this aspect we shall also raise an issue of double jeopardy and fact that accused was unrepresented in the lower court. His rights were violated as he did not have access to the statements of witnesses article 50 (2) of constitutional were violated as he did not have an advocate. The offence the accused was charged with was serious. He was not informed that he could be provided with an advocate at the expense of state. Appeal has a high chance of success”.**

(7) Evidently the constitutionality of the lower court proceedings was raised. This is what the Judge said in answer to those issues-

**“As to the argument that the sentence imposed on the appellant was unconstitutional and or illegal, the prosecution supplied an answer through the two authorities; R Vs Omar Ali Abdalla & others**

**as well as Chukwu Vs R. In the latter case, which this court followed in the former, the Court of appeal stated that**

**“A person convicted for an offence under S.4 (a) of the Act ..... Shall be fined Kshs. one million, or three times the value of the drug (whichever is greater) AND in addition to imprisonment for life”.**

**Statements by the appellant’s counsel during the hearing of the application to the effect that the appellant was not informed of his right to be represented by counsel at the trial, are not in the affidavit supporting the present applications, or the Grounds of Appeal. Equally, in his supporting affidavit to the instant application the appellant has not complained that he was denied access to witness statements prior to the commencement of the trial”.**

(8) This Court is happy to accept that the right of a person to apply for the enforcement of a fundamental right under Article 22 is in itself a fundamental right and should not be stifled, clogged or fettered except where the manner in which the Petitioner approaches the Court itself defiles the law.

(9) This Court does also recognize that under the provisions of Article 165 it is incumbent upon the High Court to determine any constitutional questions that arise before it whether in exercise of its original or appellate jurisdictions. Judge Meoli was fully aware of this and considered the questions raised in respect to the constitutionality of sentence. As to the issue of representation and witness statements the Judge was of the view that, although raised at the submissions stage, they were not raised in the Grounds in support of the application or in the Grounds of Appeal.

(10) As I understand it, the arguments on representation and witness statements were rejected as they had not been properly taken up. The manner in which those issues were introduced into and presented in the proceedings was not accepted by the Court. The strategy adopted by the Petitioner failed him. The Petitioner would be using this application to make up for the deficiencies in his bail application. To allow him now to use this application to take a second bite at the cherry would be to allow him to abuse the process of Court. That breaches the Doctrine of Issue Estoppel or issue preclusion as the application seeks to re-urge issues that were alive and determined at the bail proceedings. The stance this Court takes would find support in the holding of the Court on **Booth Irrigation and Mombasa Water Products Limited (Booth Irrigation No. 1) Nrb. HCCC Misc. Application No. 1052 of 2004** where the Court said –

**“Although Constitutional Applications should be heard on merit, I find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res judicata is in turn based on the principle grounded on public policy that litigation at some point must come to an end. Res judicata is a fundamental principle of our law.”**

Although this decision was made in the context of the previous constitution it applies to the current constitutional order.

(11) For this reason I disallow the application of 3<sup>rd</sup> January 2012.

Dated and delivered at Mombasa this 4<sup>th</sup> day of September, 2012.

**F. TUIYOTT  
JUDGE**

Dated and delivered in open court in the presence of:-  
Essendi for the Petitioner  
No appearance for the Respondent  
Court clerk - John

**F. TUIYOTT**  
**JUDGE**