REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW DIVISION
PETITION NO. E033 OF 2024

MOHAMMED DADI KOKANE……..…..1ST PETITIONER
ALFRED NJURUKA MAKOKO……...2ND PETITIONER
SAMWEL MWACHALA MWAGHANIA……...….3RD PETITIONER
JAMES CHACHA MWITA……....4TH PETITIONER
-VERSUS-
DIRECTOR OF PUBLIC PROSECUTIONS……...….RESPONDENT

JUDGMENT

1. The petitioners are prisoners serving a jail term of 40 years for the offence of murder. They have filed this constitutional petition essentially questioning their conviction and sentence. At least this is what I gather from their prayers in the petition; those prayers have been captured in the petition as follows:

> ***"A. An order that by the prosecution omitting to charge the perpetrator and proceeding to tell the court that it was him alone who killed the deceased, our right to be informed of the charge and with sufficient detail to answer it, under Article 50 (2) (b) of the Constitution has been denied, violated and infringed.***
>
> ***B. An order that a conviction whose principal offender has not been charged and tried amounts to conviction without trial, in breach of our right to be presumed innocent until the contrary is proved under Article SO (2) (a) of the constitution, as well as the***

most basic of the rules of natural justice, and contrary to Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

C. An order that the conviction on the doctrine of COMMON INTENTION in a case where the principal offender has not been subjected to trial is an outright denial of our right to access justice under Article 48 and the right to equality before the law and equal benefit and protection of the law under Article 27 of the Constitution.

D. An order that the sentence imposed upon us, devoid of sound conviction in the subject trial, amounted to detention without trial, entitling us to a remedy in the form of compensation under Article 23 (3) (e) of the constitution.

E. An order that the sentence of 40 years infringes upon our right not to be subjected to any cruel and inhuman treatment under Article 25 of the Constitution, our right to dignity under Article 29 and right to least severe sentence Article 50(2)(p) of the constitution.

F. An order that the sentence of 40 years that did not take into account the fact of our advanced ages was discriminatory considering the current LIFE EXPECTANCY as observed by the

Court of Appeal in the case of All ABDALLA MWANZA (see below for the authority).

G. An order that our right to be tried before an impartial court was violated because the trial in our case was handled with blatant partiality, considering the aforementioned procedural and constitutional lapses in the trial itself.

H. Any remedy that befits our grievances in respect to the numerous violations and infringements of our rights."

2. The petitioners swore a joint affidavit in support of the petition. They have sworn that they were convicted of the offence of murder on 18 December 2014. Their appeal to the Court of Appeal on both conviction and sentence was dismissed.
3. Even then, the petitioners contend that in imposing the sentence of forty years as the prison term, the trial court failed to take into consideration the fact of their age. At the time of conviction, the petitioners were respectively aged 42, 56, 49 and 59 years thus the sentence of 40 years was tantamount to life imprisonment.
4. As far as their conviction is concerned, the petitioners contend that the person who was identified by the prosecution witness as having occasioned the fatal blow to the deceased was not charged. Accordingly, it is their position that the conviction was unsustainable and invalid.

5. I have had the opportunity to read the judgment delivered by this Honourable Court (Odero, J.) in **Republic versus Mohammed Dadi Kokane & 7 Others (2014) KEHC 1088(KLR** according to which the petitioners were convicted and subsequently sentenced. The judgment was delivered on 17 December 2014.

6. In the judgment, the learned trial judge established as a fact that one Salatt had fatally stabbed the deceased but that he had absconded. That notwithstanding, the petitioners were still held liable for the offence of murder. The court held as follows:

> ***"One would be tempted to ask why the accused persons are in court facing a charge of murder yet the man who delivered the fatal blow has by all accounts absconded. The fact is that in law criminal culpability does not visit only the person who committed the act in question, equal criminal culpability lies with any person or persons who aided, abetted or were in any other way complicit in the illegal act or omission.***
>
> ***In this regard section 20(1) of the Penal Code Cap 21 Laws of Kenya provides as follows:***
>
> > ***"20(1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it that is to say***

a. Every person who actually does the act or makes the omission which constitutes the offence

b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence

c. Every person who aids or abets another person in committing the offence

d. Any person who counsels or procures any other person to commit the offence……."

7. On whether the accused shared a common intention in murdering the deceased, the learned judge held as follows:

"Did the accused persons at the time they were executing this attack share a common intention with the man who stabbed the deceased. In CRIMINAL LAW – THE FUNDAMENTALS 1ST Edition by Mcalhone & Huxley-Binns a joint enterprise is defined as follows:

"A joint enterprise is where two or more parties embark upon the commission of a criminal offence with a common purpose. Essentially under the doctrine of joint enterprise, participants in such an enterprise are liable not only for their own acts committed in furtherance of the enterprise but also for the acts of other participants even if the

consequences of such acts are unforeseen. The common purpose involves agreement consensus between the parties. This does not mean there has to be any formality involved. Consequently, although in many instances there will have been a plan to commit an offence, this is not required. Agreement may arise on the spur of the moment, with nothing being said at all. It can be made with a nod and a wink, or a knowing look or even inferred from the behaviour of the parties involved..."

8. The learned judge went on to state:

"As I stated earlier this was no random attack. The assailants acted in a group. They were all armed to the hilt. They signalled to each other through shouts and whistles. This was a formation. The other eyewitnesses give a similar narration of the attack. The group was armed, co-ordinated and on a mission to 'kill' the deceased and his team. It is clear that they were lying in wait for the deceased. They struck just as the deceased and his team got out of their vehicle to remove the last barrier placed on the road to their camp. The intention of the group was clear and evident – they were determined to use any means necessary including use of lethal force to prevent the deceased from accessing his camp. These were actions which were carefully planned and executed.

The group had a common mission and a common intention. Section 21 of the Penal Code provides:

> ***"Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, <u>each of them is deemed to have committed the offence.</u>" (my emphasis)***

Here the common intention was to prevent the deceased reaching his camp. The actions of the accused were unlawful in that they had no right to block the deceased from using a public road, or from accessing his own property…The accused acted unlawfully in blocking the road and in attacking the deceased to prevent him reaching his camp. In prosecuting this unlawful purpose an offence was committed – the deceased was murdered. The accused persons are criminally culpable for this loss of life."

9. In conclusion, the learned judge held:

> ***"Likewise in the case of NJOROGE VS. REPUBLIC [1983] KLR 197 the Kenya Court of Appeal held that***:
>
> > ***"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all***

who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endevours to effect the common object of the assembly.

"The accused and their cohorts were all armed with dangerous and offensive weapons. They set upon the deceased and his team who were unarmed. The attack was unprovoked. Such action in the minds of the accused persons would clearly have no outcome other than grievous harm or death to the victims. Indeed this is exactly what happened. The deceased was fatally stabbed during the attack. I am satisfied that the prosecution have proved that the 1st, 2nd, 3rd and 4th accused persons and their group in addition to having a common unlawful intention, acted on this common intention with malice aforethought. The ingredients of the offence of murder having been proved beyond a reasonable doubt, I hereby convict the 1st, 2nd, 3rd and 4th accused persons of the offence of murder contrary to section 203 of the Penal Code of Kenya."

The petitioners were then sentenced to 40 years imprisonment.

10. In **Mohammed Dadi Kokane & 3 others v Republic (2019) KECA 960 (KLR),** the petitioners, appealed to the Court of Appeal against both the conviction and sentence. The Court rendered its

judgment on 14 February 2019 and dismissed the appeal. The court held, inter alia, as follows:

> ***"18. It is common ground that the appellants' convictions were mainly based on identification and the doctrine of common intention both of which the appellants are challenging. Accordingly, the appeal herein turns on the following issues:***
>
> ***i. Were the appellants positively identified as some of the assailants and/or were they placed at the scene of crime?***
>
> ***ii. Did the trial court err in invoking the doctrine of common intention?***
>
> ***iii. Was the offence of murder established against the appellants***?

11. On the first question which the court identified for determination, it held as follows:

> ***"The recognition evidence which placed them at the scene of the crime remained intact."***

12. As for the second question, the court held as follows:

> ***"30. It is not in dispute that none of the appellants stabbed the deceased rather the prosecution witnesses were unanimous in their evidence that it was one Salat who inflicted the fatal injury on the deceased. Therefore, the trial court in linking the appellants to the deceased's murder relied on the doctrine of***

common intention which is delineated under Section 21 of the Penal Code as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

31. The essence of the doctrine was aptly stated by the predecessor of this Court in Wanjiru d/o Wamerio vs. R 22 EACA 521 as follows:-

> ***"Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with"***

32. Did the trial court err in invoking the said doctrine? The essential ingredients which give rise to the doctrine of common intention were enunciated in Eunice Musenya Ndui vs. R [2011] eKLR as herein under:

> ***1) There must be two or more persons;***
>
> ***2) The persons must form a common intention;***

3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

4) An offence must be committed in the process;

5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

33. It is without doubt that the appellants were in the company of others who are still at large. It is equally clear that they had formed a common intention to unlawfully bar the deceased and his agents from accessing Scorpion Camp by any means possible. Moreover, they were lying in wait and/or planned to ambush the deceased and his company when they were called upon to by the ring leaders. This is evidenced by utterances made to the effect that they were out to harm the deceased and his company coupled with the fact that they were armed with weapons. It was in the process of carrying out the above mission that a violent physical confrontation erupted which ultimately led to the deceased's death.

34. In light of the foregoing, we find that the appellants while acting in the manner they did must have intended the consequences of their actions especially bearing in mind that they

viciously attacked the deceased and his companions. See this Court's decision in Stephen Ariga & another vs. R (2018) eKLR. As such, we find no fault on the part of the trial court in invoking the doctrine of common intention to convict the appellants for the deceased's murder.

13. On whether the offence of murder was proved beyond reasonable doubt, the court held that malice aforethought was established on the part of the appellants because of the weapons employed and the injuries inflicted on the deceased. The court then stated:

"In finding so, we are guided by the predecessor of this Court in Rex vs. Tuper S/O Ocher (1945) 12EACA 63 wherein, it held:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

14. As far as the sentence is concerned, the court held as follows:

"36. On the issue of sentence, we note that the trial court issued the same after taking into consideration the appellants' mitigation and exercising its discretion in accordance with the

holding of the Supreme Court in Francis Karioko Muruatetu & another vs. R [2017] eKLR."

15. Unbowed, the petitioners initiated a constitutional petition in this Honourable Court reported as **Mohamed Dadi Kokane & 2 others v Director of Public Prosecution [2021] KEHC 4599 (KLR).** According to the judgment delivered in that petition on 29 July 2021, the petitioners were dissatisfied with both the decision of this Honourable Court and that of the Court of Appeal. Accordingly, they sough a review of review of the trial process and sought to be heard and evidence taken afresh. Their petition was pegged on article 50(1), (2) and 6(a) and (b) of the Constitution.

16. The following excerpts from the judgement in the constitutional petition reveal the petitioners' grievances:

"The Petitioners submit that the charges against them were not compliant with the provisions of Sections 134 and 137 of the Criminal Procedure Code, since the information implied that the Petitioners had taken part in the killing of Bridged Rodney, yet it emerged that the eye witness was referring to someone who was at large, as the one who killed the deceased and despite the issue of the defectiveness of the charge being raised by counsel for the Petitioners, the trial court overlooked the said issue of defectiveness. Consequently, there was an infringement of the

Petitioner's right to fair hearing guaranteed under Article 50 (2) of the Constitution.

3. The Petitioners also submitted that the prosecution did not prove its case beyond reasonable doubt since the element of malice aforethought to kill the deceased was not proved beyond reasonable doubt since there was no common intention to kill the deceased. Further, the Petitioners submitted that the identification of the Petitioners was utterly unreliable since PW1, PW2, PW3, and PW15's testimonies were total lies, fabrications and incriminated innocent people. Consequently, the prosecution evidence was unreliable, inconsistent, contradictory, not credible and the same inadmissible.

4. On the sentence, the Petitioners submitted that there was a serious error on the part of the trial judge in invoking the doctrine of common intention to justify the conviction against the Petitioners when there was no evidence to support the said finding. Therefore, the sentence of 40 years for the Petitioners who were present during a murder but there is no evidence that they actually participated in the murder was not justified.

6. The Petitioners also submitted that the trial court did not consider their Pre-conviction custody period when sentencing

them to serve 40 years imprisonment, which is contrary to the provisions of section 333(2) of the Criminal Procedure Code."

17. In its judgment, the Court (Ogola, J.) held as follows:

"16. In the instant case, I have looked at the Court of Appeal decision and this Court finds that the Grounds of Appeal raised by the Petitioners, which were determined by the Court of Appeal were the following.

a. Finding that the appellants had a common intention to murder the deceased.

b. Convicting the appellants on insufficient and incredible evidence.

c. Failing to resolve the material contradictions and inconsistencies in the prosecution case.

d. Rejecting the appellants defence

e. Finding that the prosecution had established its case to the required standard.

17. From the foregoing, save for the issue of pre- arraignment custody and Pre-conviction custody, this court does not find any new and compelling evidence that could, prima face, affect the petitioner's trial, outcome or sentence. What is relied on as new evidence was before the trial court and that court must have considered it wholly. As observed by the Court of Appeal in Tom

Martins Kibisu's case (supra), the opportunity offered by Article 50(6) of the Constitution, strongly suggests, that a conviction is final and conclusive where the convict has exhausted his right of appeal so long as no new and compelling evidence has come to light."

18. The petition was dismissed except that the learned judge ruled that the petitioners' sentences were held to run from the time they were placed in custody, a factor which the learned judge held was not considered when the petitioners were sentenced and when they appealed in the Court of Appeal.

19. The reason I have extensively quoted the judgments by this Honourable Court both in the petitioner's criminal trial and their petition and the judgment of the Court of Appeal is to demonstrate that all the issues that the petitioners have presented in this petition have either been litigated or could have been litigated upon and determined in any of the three fora. In short, they ran a full course; first, they were tried, convicted and sentenced by this Honourable Court; secondly, they were heard on their appeal against both the conviction and sentence; and, finally, they had a chance to be heard on a constitutional petition in this Honourable Court after their appeal was dismissed.

20. Against this background, the instant petition is *res judicata* and an abuse of the due process of the court. It has been held that *"abuse of the*

process" is not defined and that the categories of abuse of process are many and are not closed. Abuse of the process comes in many guises. One form which abuse of the process can take, was first identified in **Henderson v- Henderson (1843) 3 HARE 100** where it was held:

> ***"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (accept under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have from negligence, inadvertence or accident omitted it as part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and announce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time".***

21. And in **Johnson v- Gore Wood & Co [2002] 2 AC 1 at 31** Lord Bingham held:

> ***"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The***

underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same manner. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. " Bezant v. Rausing & Ors, [2007] EWHC 1118 (QB) (May 14, 2007).

22. The issues raised by the petitioners have been adjudicated upon before and even if they were not, it was incumbent upon the petitioners to bring forward their whole case at the trial, at the appeal level and at the hearing of their petition. It is in the public interest and in the interest of the parties to any particular litigation that judicial resources are employed efficiently, effectively and economically. This is the policy behind the principle that there must be an end to litigation.

23. I need not belabour the point that the petition is *res judicata* and an abuse of the process of the court. It is hereby struck out. I make no orders as to costs.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE