IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (P), MWERA & OUKO, JJ.A)

CRIMINAL APPEAL NO. 1 OF 2011

BETWEEN

JOSEPH KABARIA KAHINGA & 9 OTHERS ……. APPELLANTS

AND

REPUBLIC ……. RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Warsame, J.) dated 8th February 2011

in

HC. CR. MISC. 618 OF 2010)

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JUDGMENT OF THE COURT

Initially, there were eleven (12) appellants in this appeal but it would appear two of them, Daniel Kioko Mbuva and Joseph Baariu Imiemba, by their respective notices filed on 15th July 2014 withdrew their appeals, leaving only the nine (10) appellants who were before the court when the appeal was argued on 5th November 2014.

The appellants were separately charged with and tried by different courts for various capital offences under **section 296 (2)** of the Penal Code (robbery with violence), **section 297 (2**) of the Penal Code (attempted robbery with violence) and **section 203** as read with **section 204** of the Penal Code (murder) for which they were convicted and sentenced to death. Their appeals were dismissed and the death sentence ultimately confirmed by this Court.

Brought together by their fate, the death sentence, the appellants jointly petitioned the High Court for a declaration, *inter alia*, that the death sentence imposed by the respective trial courts, confirmed by this Court and commuted to life imprisonment by the President, are inconsistent with **Article 50 (2) (h) (p)** of the Constitution; that some of the appellants were not given an opportunity to mitigate before sentence and the respective mitigation of those who were given the chance was not taken into consideration before sentence; and finally, that **sections 296 (2), 297 (2)** and **204** of the Penal Code are inconsistent with **Articles 26 (1), 27 (1), 28, 48, 50 (1) (2) (p)** of the Constitution.

For these reasons, the appellants prayed that the High Court be pleased to remit their cases to the trial courts, for the purpose of receiving and consideration of their mitigation, or to proceed to acquit all of them in view of the violation of their fundamental freedoms and human rights by the decisions of the courts.

Together with the petition, the appellants filed an application under certificate of urgency for conservatory orders whose effect, we understand, was to have the sentences suspended until the hearing and determination of their petition.

The application for conservatory orders was placed before Ombija, J. who directed that it be served for hearing *inter partes*. The Judge also directed that the appellants' Court of Appeal records be attached to the application and finally that the Attorney General be served with the application.

The application was set down for hearing before Warsame, J. (as he then was). After hearing very brief submissions by the appellant's counsel whose address did not touch on the grounds upon which the application was brought, the learned Judge immediately rendered a one and half page ruling dismissing both the application and the petition saying:-

> **"…the long and tedious journey and/or legal battle came to an end upon rejection of the appeal on consideration of merit….. It is in the interest of the public that criminal litigation should be orderly, efficient and with a view to punish offenders for their crimes…Justice is meant to cut in both ways, which means persons who commit crimes must be charged, convicted and sentenced in accordance with the law if the offence is proved beyond reasonable doubt….Consequently, I think this Court has no jurisdiction and/or powers to entertain the application by the applicants. It must be brought to an end. Accordingly, the application and petition are hereby rejected as misconceived. File to be closed."**

The appellants, who were aggrieved by this order have challenged it before us arguing in their memorandum and supplementary memorandum of appeal that;

i. The appellants have already served their sentences and should be set at liberty.

ii. The learned Judge misdirected himself in dismissing the application yet it was not opposed.

iii. The learned Judge's order dismissing the application and the petition without hearing the appellants was in contravention of **Article 50** of the Constitution.

iv. The learned Judge misapprehended the jurisdiction of the High Court as provided for in **Article 23** of the Constitution.

v. The learned Judge failed to consider and follow the decisions of the Court of Appeal on the mandatory nature of the death sentence.

vi. **Section 297 (2)** of the Penal Code is irreconcilable with **section 389** of the Penal Code exposing the appellants to suffer injustice.

From the submissions of Mr. Ondieki learned counsel for the 1st to 8th appellants and those of the 9th appellant conducting his appeal in person, the argument before the learned Judge appears to us to raise the questions, whether the death sentence imposed on the appellants under **section 296 (2), section 297 (2)** and **section 204** of the Penal Code is contrary to the provisions of the Constitution for being inhuman and discriminatory; whether in view of this Court's decisions in

Evanson Muiruri Gichane V. R, Criminal Appeal No. 277 of 2007, **David Mwangi Mugo V. Republic** Criminal Appeal No. 368 of 2007, among other decisions, the proper punishment for the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code is a term of imprisonment not exceeding seven (7) years; that on the authority of **Godfrey Ngotho Mutiso V. R,** Cr. Appeal No. 17 of 2008, whether death sentence is the only sentence for the offences of murder under

section 204 and robbery with violence under **section 296 (2)** aforesaid.

According to the appellants, had the learned Judge heard the application, he would have probably found that their individual fundamental rights and freedoms were violated in the course of trial and in the decisions of the courts upholding their death sentence; that the death sentence was imposed arbitrarily.

Mr. Orinda, learned counsel for the respondent in opposing the appeal submitted that the appellants' individual cases and appeals were determined before the present Constitution was promulgated; that the appellants approached the High Court with a strange but novel procedure; that the learned Judge properly found that he had no jurisdiction in the matter; and that the petition was a clear abuse of the court process.

By the very nature of this appeal, we cannot consider the merit of the rejected application and petition. All the appeal seeks in broad terms is our determination on the question whether or not the learned Judge, in striking out the application and the petition properly directed himself in law. It is apparent to us, from the appellants' counsel's very brief address before the learned Judge and from the fact that counsel for the respondent, though present in Court, was not given an opportunity to say anything about the application, that the learned Judge treated the matter with extreme sense of urgency. On the spot, he rendered the decision reproduced earlier in this judgment. Even though only the application for conservatory orders was before him, the learned Judge in that terse ruling disposed of both the application and the petition.

The power to strike out pleadings, whether in civil or criminal proceedings, it has been repeatedly stated, is draconian and must be sparingly resorted to. It can only be exercised in the clearest of cases. See **D.T. Dobie & Co. (Kenya) Ltd V. Muchina** (1982) KLR 1. There is particularly a compelling need to uphold these principles where the pleadings in question relate to an alleged violation of human rights and fundamental freedoms, like was the case before the learned Judge here.

It will be recalled that the petition was brought pursuant to the revoked Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Specifically, the application for conservatory or interim orders was made under **Rule 20** of the rules. Those rules made no provision for the striking out *in limine* of the petition or application brought pursuant to **Rules 11** and **12** aforesaid. This fact strengthens our conviction that in matters of alleged violation of human rights there is no room for summary procedure.

Traditionally, under **Order 2 Rule 15 (2)** of the Civil Procedure Rules there are only four (4) circumstances under which a pleading may be struck out; if it discloses no reasonable cause of action or defence, or if it is scandalous, frivolous or vexatious, or if it may prejudice, embarrass or delay the fair trial of the action, or if it is otherwise an abuse of the process of the Court. The rule governing the striking out of pleadings will also apply to originating summons and a petition, according to **Rule 15 (3)** of **Order 2**. From the extracted passage of the ruling set out earlier in this ruling, it appears to us that the learned Judge believed that what the appellants were engaged in amounted to an abuse of the process of the court; that the petition raised questions that had already been determined up to the Court of Appeal hence the High Court had no jurisdiction to reopen them being *res judicata.*

While the court, no doubt, has inherent jurisdiction, even in the absence of an application, to strike out any pleading that is clearly brought in abuse of its process, that power, we reiterate, can only be exercised in clearest of cases. It is a time old practice of the rules of natural justice for parties who seek justice to have their day in court irrespective of the ultimate decision. That is what Fletcher Moulton, L.J. emphasized in his often-quoted passage from **Dyson V. Attorney General** (1911) IKB 410 at 418.

> **"To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."**

The appellants invoked **Article 23** as read with **Article 165** of the Constitution that vest in the High Court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The learned Judge ought to have been

patient with the appellants in order to appreciate what they were seeking from the court instead of proceeding in a manner that suggests that he assumed that they were challenging their conviction and sentence once more.

On the sole ground that the leaned Judge erred in failing to grant the appellants a chance to canvass their application, we allow this appeal. We are however aware that this Court's decision on death sentence in **Joseph Njuguna Mwaura & 2 others V. R,** Criminal Appeal No. 5 of 2008 is the subject of appeal in Supreme Court, Criminal Appeal No. 8 of 2014.

In allowing the appeal, we are of the view that no useful purpose will be served three years today in determining the application for conservatory orders. But we think there is considerable merit in giving the appellants another chance to be heard on their petition.

In the circumstances, pursuant to **Rule 31** of the Court of Appeal Rules, we reverse the decision of the High Court rendered on 8th February, 2011 and remit to it (the High Court) the appellants' High Court Petition No. 618 filed in that court on 22nd October 2010 with the direction that it be heard *de novo* by the relevant Division.

We make no orders as to costs.

Dated and delivered at Nairobi this 18th day of December 2014.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR