REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 16 OF 2015

ALI NGUMBAO BAYA ……..……...… 1ST PETITIONER

KAZUNGU MAE MARINGA …..…….…… 2ND PETITIONER

KAHINDI NGUMBAO BAYA …….....……. 3RD PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION .....RESPONDENT

JUDGEMENT

The petition herein seeks the following orders: -

1. **That, this Hon. Court be pleased to grant a declaration that our (defendants') herein the petitioners constitutional rights have been breached and contravened by the respondent by failing to comply with the mandatory provision of Section 213 and 310 of the criminal procedure code when allowed the exclusion of the defendants by way of written submission during hearing of the defendants trial issue that greatly prejudiced the defendants' rights to listen and understand all that is said at trial.**
2. **That, the decision of the trial court to allow written submission to be filed in the court registry was issue that denied us (the defendants) rights to participate in our own trial and to comment on what was right and what was wrong therefore we (defendants) lost a legitimate right or expectation to hear and to comment what was said.**
3. **That, such denial was a violation of our (defendants') rights under Articles 20, 21, 22, 23 (1) (3) and 50 (2) (f) of the Constitution of Kenya 2010.**
4. **That, throwing us (the defendants) herein the petitioners into prison cell for the rest of our natural lives as if we were a 'thing', instead of person without any continuing duty to respect our (the defendants') dignity which include the right not to live in despair and helplessness and without any hope of release would surely infringe our (the defendants') rights to human dignity as provided for in article 28 of the Constitution.**

The petition is supported by a joint affidavit sworn by the three petitioners. The petitioners filed written submissions in support of their petition. The respondent filed a preliminary objection and a replying affidavit sworn by Mr. David Fedha on 18th April, 2016.

All Ngumbao, the 1st petitioner was authorized to submit on behalf of himself and his two other colleagues. It is submitted by the petitioners that they were charged with the offence of murder and

sentenced to death. During the hearing of their murder trial, the case was concluded and fixed for submissions. However, they were not taken to court during the date of submissions. It is also submitted that the trial court allowed written submissions and this did not give them a chance to give their advocate some legal points.

The petitioners submit that the fact that they were not present in court during submissions is good reason to change the outcome of the case. The hearing before the trial court was not fair. They did not give their input to the submissions.

Mr. Monda, prosecution counsel, opposed the petition. Counsel relied on the replying affidavit. Counsel maintains that there is no new and compelling evidence being raised by the petition. The petitioners have not shown how they were prejudiced in the course of the trial. The authority being relied on is based on the old constitution and is displaced by Article 159 of the New Constitution.

I have read the petition herein. The petition revolves around the issue that the petitioners were not in court when submissions were made and that the trial court allowed their advocate to file written submissions. The written submissions excluded the petitioners from giving their legal input. The petitioners submit that Article 50 (2) (f) of the new constitution provides that an accused person has the right to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed. The petitioners also rely on the case of **ROBERT FANALI AKHUYA VS REPUBLIC: Kisumu Court of Appeal Criminal Application No. 42 of 2002** where the Court of Appeal held that written submissions do not have any sanction of law.

The petitioner further submit that Section 213 of the Criminal Procedure Code allows the prosecutor or the accused or his advocate to address the court. Section 310 allows the prosecution to reply to accused's submissions if the accused adduces any evidence.

The record of the trial court shows that the defence closed its case on 25th August, 2010. Mr. Shujaa, Advocate for the petitioners, told the court that he was closing the defence case and would like to be permitted to file written submissions. The trial Judge allowed the filing of the written submissions and the matter was to be mentioned before the Deputy Registrar on 7th September, 2010. On 7th September, 2010 the matter was mentioned before the deputy Registrar, D.W. Nyambu. The petitioners are recorded to have been present. It appears that their advocate was not present and it was listed for mention 21st September, 2010. Once again the petitioners were present. It was adjourned to 29th September, 2010 and on that day Mr. Shujaa informed the court that he had filed his submissions. The petitioners were present. The file was placed before the trial Judge on the same day 29th September, 2010 having been mentioned earlier before the Deputy Registrar. Mr. Shujaa informed the court that he did not wish to add anything to his written submissions. The trial court fixed the matter for judgement on 28th October, 2010.

From the record of the trial court, it is clear that the petitioners were brought to the court on 29th September, 2010. Although the High Court coram for that date does not show that the petitioners were in court, the coram for the Deputy Registrar indicate that they were in court. The contention by the petitioners that they were in prison is misplaced by the record.

The issue which then follows is whether the trial court fatally erred by allowing written submissions. Reliance has been placed on the Court of Appeal decision in the case of **ROBERT FANALI AKHUYA (supra)** case. That case was decided on 12th July, 20102. It no longer stand as good law. Article 159 of the Constitution is against technicalities. Submissions can either be oral or written. It all amounts to addressing the court as provided by Sections 213 and 310 of the Criminal Procedure Act. Submissions simply put means an evaluation of the evidence by each party and analysis of the law. This can be done either orally or in writing. At times parties make oral submissions in furtherance or addition to their written submissions. The idea of filing written submissions is intended to save on judicial time and also to enable the parties or their advocates to condense their thoughts on the matter at their own and in good time. This gives the parties enough time to evaluate the case and put down their view in writing. Written submissions gives parties latitude to explain their respective cases with ease as opposed to oral

submissions which can be limited inform of time. I have seen the submissions filed by Mr. Shujaa on behalf of the petitioners and they are quite detailed running into five pages.

The petitioners have not told the court what are the legal points that were not included in the submissions or what legal issues they wanted to pass over to their advocate. It should not be taken that the mere absence of an accused person in court when the matter is simply being mentioned amounts to violation of Article 50 of the Constitution or any other constitutional right. The holding that the term addressing the court is restricted to formal speech made orally before the curt is a narrow interpretation of Sections 213 and 310 of Cap 75 laws of Kenya. Written submissions qualify to be part of **"addressing"** the court. It has been argued that when submissions are written by advocates, the client may not have had his input in the submissions or that an accused person need to hear in court what his advocate is submitting. These are just assumptions. The advocate can discuss with his client and agree on the submissions. The advocate is the expert who leads the client and not otherwise. Apart from adducing their evidence, the three petitioners sat in court silently as their advocate cross-examined witnesses and continued handling their case. There is no allegation that the submissions did not capture relevant issues about the case.

The petitioners' contention that their rights were violated is misplaced. They were in court all along. They had an opportunity to tell their advocate what to include in the written submissions. There was no miscarriage of justice. The petitioners were not prejudiced. The petitioners have also raised the issue of the death sentence being inhuman and violating human dignity. The sentence is lawful under Section 204 of the Penal Code. Similarly, Article 76 (3) of the Constitution acknowledges that a life can be deprived if the deprivation is permitted by law.

The upshot is that the petition herein lacks merit and is hereby dismissed.

Dated and delivered in Malindi this 20th day of June, 2016.

S.J. CHITEMBWE

JUDGE