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Advocates:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONST. PETITION NO. 13 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 6, 10, 19, 20, 21, 22, 23,

24, 25, 27, 28, 48, 49, 50, 52, 159, 160, 161, 162, 258, 259

AND 260 OF THE CONSTITUTION OF KENYA 2010,

AND SECTION 7 (1) OF SCHEDULE 6 OF

THE CONSTITUTION OF KENYA

AND

THE VIOLATION AND THREATENED VIOLATION OF ARTICLES

1, 2, 6(3), 10, 19, 20, 21, 23, 24, 25, 27, 28, 48, 49, 50(1), 159, 160, 161, 162, 165, 258,

259, AND 260 OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 7(1) OF

THE SCHEDULE 6 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4, 11, 12 AND 13 OF THE PENAL CODE (CAP 63)

AND

IN THE MATTER OF SECTION 3(3), 4, 6, 7, 8, 14, 166 AND 167 OF THE

CRIMINAL PROCEDURE CODE (CAP 75) AND THE FIRST SCHEDULE THEREOF

AND

IN THE MATTER OF A DETERMINATION WHETHER THE PROCEDURAL REQUIREMENT

THAT A PERSON FACING A CHARGE OF MURDER CONTRARY TO SECTION 203 AS

READ WITH SECTION 204 OF THE PENAL CODE SHOULD UNDERGO OR BE

SUBJECTED TO A MENTAL ASSESSMENT BY A PSYCHIATRIST AS A BASIS IN

LAW AND WHETHER THE REQUIREMENT IS CONSTITUTIONAL

BETWEEN

RICHARD NUNDA NYAOKE..1ST PETITIONER

WASHINGTON ODHIAMBO AWILI...2ND PETITIONER

CHARLES HENRY NYAOKE..3RD PETITIONER

AND

THE HON. ATTORNEY GENERAL...1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION...2ND RESPONDENT

THE KENYA LAW REPORT COMMISSION..3RD RESPONDENT

JUDGMENT

The Petitioners were charged with the offence of **Murder** Contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

1. They have pointed out that the Courts have developed a requirement that any person who is accused of the offence of Murder must undergo a mental assessment before he can be called upon to plead to the charge.

2. It is common ground that if an accused person is convicted for the offence of Murder, the maximum prescribed penalty is Death.

3. It is also common ground that there are other offences for which an accused person may be sentenced to death: those other offences include Treason and Robbery with Violence.

4. However, whilst the prescribed sentence for those other offences was Death, the persons accused of committing them are not required to undergo mental assessment prior to taking a plea.

5. Therefore, the Petitioners submitted that the impugned requirement is discriminatory against persons accused of committing Murder.

6. The Petitioners have asked the Court to declare the requirement to be unconstitutional, as it offends the right to equality before the law.

7. The Petitioner submitted that the Honourable Attorney General had refused to advise the Director of Public Prosecution on the illegality, unlawfulness and unconstitutionality of the procedure requiring persons accused of Murder, to undergo compulsory mental assessment prior to taking plea.

8. On his part, the **Director of Public Prosecution** is faulted for knowingly, conscientiously and actively participating in the unconstitutional procedure.

9. And the **Kenya Law Reform Commission** was faulted for refusing, ignoring or neglecting to originate reforms on the relevant laws so as to bring them in tandem with the provisions of the Constitution.

10. The Petitioners submitted that;

"The requirement that a person accused of murder should and must be subjected to or must undergo a mental assessment before being called upon to plead to the charge is unconstitutional given that;

(a) It is discriminatory against persons accused of murder.

(b) Dilutes the Court's impartiality.

The Court descends to the arena by determining the mental condition of an accused person.

(c) It does not presume the accused person innocent until the contrary is proved before a court of law or any other independent tribunal or body.

(d) It takes away the defence of insanity from the accused person even before he pleads to the charges.

(e) It leads to delay the taking of the plea and hence a delay in the prosecution of the case.

It takes away the accused's right to refuse to give self-incriminating evidence as he is forced to be a specimen for examination against his will. The court takes away the accused person's right to the defence of insanity. The court shades off its impartiality by assisting the prosecution to eliminate the possibility of the accused person putting forward the defence of insanity.

(f) It takes away the accused person's right to be brought before a court of law within a reasonable time on account of having not been subjected to a mental assessment.

(g) More often than not, the requirement that a person accused of or charged with the offence of murder is taken for mental/psychiatric assessment, results in such a person being held in custody for a longer time than necessary and for a fault that is not of his/her making and in breach of Article 49 (1) (h) of the Constitution of Kenya 2010."

11. The Respondents opposed the Petition.

12. In determining the Petition, the Court has to answer the question about whether or not the Petitioners have made out a case to entitle them to the following reliefs:-

"(a) A declaration be made that the Respondents jointly and severally have failed in executing their constitutional mandate, discharging their duties and or responsibilities in advising the Government and its institutions of the right to equality before and under the law.

(b) A declaration be made that the Respondents have not jointly and severally carried out their statutory and regulatory duties and or responsibilities in ensuring that the law, statutes, regulations and or rules relating to trial, accord all accused persons equal and similar rights in line with the Constitution and International instruments applicable in Kenya pursuant to Article 2 (6) of the Constitution.

(c) A declaration be made that the Respondents, jointly and severally failed to advice the Government and or its institutions on policy to ensure that the statutes are in line and accord with the Constitution and International instruments on equality under the law.

(d) An order directing the Respondents jointly and severally to, within a specified period, undertake their respective duties and responsibilities and advice the Government and its institutions to take such steps as are necessary for the alignment of all provisions of statutes, subsidiary legislation, regulations and rules to the Constitution and in particular as relates to compliance

with Article 27 of the Constitution.

(e) A declaration that the procedural requirement that persons accused of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) is discriminatory, unconstitutional and a breach of the rights of such accused persons, and that such requirement should cease, stop and should end forthwith.

(f) An order that persons accused of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) should be called upon to plead to the charges immediately they are arraigned in court.

(g) Costs of this petition."

13. Having carefully perused the submissions made by the Petitioners, I find that although the first 4 reliefs above were worded very broadly, the Petitioners' real issue was with

regard to the requirement that a person who is charged with the offence of Murder cannot take a plea before he or she had undergone a mental assessment, and had been found fit to take plea.

14. In other words, the Petitioners are not making generalized assertions concerning the failure of the Respondents to execute their constitutional mandates.

15. However, if the Petitioners were to urge the said broad and generalized claims, I would have told them that when a Constitutional Petition lacks precision it would most probably be incapable of enforcement.

16. In this instance, the Petitioners did not demonstrate the particular mandate, duty or responsibility which the Respondents had failed to discharge jointly and severally. I so hold because the Petitioners had not provided any particulars of instances when the Respondents had failed to provide advice either to the Government or to any of the institutions.

17. As regards the right to equality before and under the law, the Respondents hold a view which was inconsistent to that of the Petitioners. In the circumstances, it would not have been possible for the Respondents to give advice on the lines propounded by the Petitioners herein, when the Respondents hold the view that it was not discriminatory to require persons charged with the offence of Murder, to undergo mental assessment prior to taking of a plea.

18. I also find that the Petitioners did not demonstrate that there were some specified laws, statutes, regulations or rules relating to trial, that failed to accord all accused persons equal or similar rights in line with the Constitution.

19. Thirdly, the Petitioners have not shown that the Respondents failed to advise the Government or its institutions on a policy which would ensure that the statutes were in line and accord with the Constitution and with International instruments on equality under the law.

20. Fourth, I find that the Petitioners failed to specify the steps which were allegedly necessary to be undertaken by the Respondents, for the purposes of the alignment of all provisions of statutes, subsidiary legislation, regulations and rules to the Constitution, and in particular as they relate to compliance with **Article 27** of the **Constitution**.

21. Each provision of a statute, subsidiary legislation, regulation or rule, which is out of sync with the Constitution must be dealt with separately. The Petitioner would need to satisfy the Court that each such provision needed to be aligned with the Constitution, in a specified manner.

22. Ordinarily, if the Court was satisfied that any particular provision was unconstitutional, the Court would make a declaration to that effect.

23. Thereafter, the relevant organs of Government would undertake such actions as may be necessary to remedy the situation.

24. It must be borne in mind that the primary task of making law or of amending the law is vested in the Legislature.

25. Pursuant to **Article 93** of the **Constitution**, the Parliament of Kenya shall consist of the National Assembly and the Senate.

26. And pursuant to **Article 94 (1)** of the **Constitution**;

"The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament."

27. It is not the function of the Court to direct parliament about which law it ought to pass or the period within which such law ought to be passed.

28. Parliament is not an appendage to the Court. It drives its legislative authority from the people.

29. When exercising its authority, parliament has the responsibility to protect the Constitution and to promote the democratic governance of the Republic. Therefore, whilst the Court cannot direct parliament on the laws it ought to enact, or the period within which such enactment ought to be undertaken; the Court has the mandate to determine whether or not any law was inconsistent with the Constitution.

30. In my understanding, if the Court held that a law was unconstitutional, based upon the violation of procedures utilized when enacting it, the Court may allow a specified duration within which the procedural anomaly may be rectified.

31. The Petitioners have asked the Court to direct the Respondents to undertake their respective duties and responsibilities, and to advise the Government and its institutions, within a specified period.

32. The advice which the Respondents are supposed to give is that the Government and its institutions should take such steps as necessary for alignment of all provisions of statutes, subsidiary legislation, regulations and rules; to the Constitution.

33. There is a constitutional imperative that all laws should be aligned to the Constitution. Therefore, it does not make sense to me that the Court should be called upon to give an order to the Respondents or to any other person, so that the Respondents or such other person should give advice to the Government and its institutions.

34. I will now revert to the issue about the requirement for mental assessment before a person who is charged with the offence of Murder can take plea.

Presumption of Sanity

35. Pursuant to the provisions of **Section 11** of the **Penal Code**, every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question, until the contrary is proved.

36. In effect, sanity is a rebuttable presumption.

37. In the circumstances, the Petitioner submitted that every person is and shall be taken to have desired the consequences of his or her actions.

38. But it is important to note that immediately after the legal provision which stipulates that every person is to be presumed to be of sound mind, **Section 12** of the **Penal Code** provides as follows;

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the

act or make the omission, but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

39. Whilst there is a legal presumption of sanity, **Section 12** of the **Penal Code** spells out the statutory defence of insanity.

40. The said defence exonerates an accused person from criminal responsibility if at the time he committed the offence he was suffering from any disease affecting his mind, if such disease rendered him incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission.

41. In my considered opinion, the ascertainment of the mental capacity of an accused person who is facing a Murder charge, does not take away the defence of insanity. I so hold because whereas the person may be fit to take a plea, at the time he was brought before the Court, it may still be possible for the said person to show that at the time he did the act or made the omission which gave rise to the charges against him, he was *"insane"*.

42. In the case of **REPUBLIC Vs CMW, HIGH COURT CRIMINAL CASE NO. 43 OF 2015** Lesiit J. (as she then was) noted that the accused suffered from Post-Partum Psychosis, on the day she caused the deaths of 2 children. The said illness was described by the psychiatric doctor as;

"…….. a disease of the mind which arises due to hormal imbalance, mainly estrogen.

The doctor testified that when it occurs, the patient may not know what is happening to them, they lack insight, ability to know they are sick and should seek help."

43. In that case the accused suffered severe depression, which caused her a loss of contact with reality. It was in those circumstances that the accused had become inexplicably violent, leading to the death of 2 children.

44. As the learned Judge noted;

"The accused appeared to have recovered from her illness and was calm, collected and followed proceedings throughout the trial."

45. Ultimately, the Court held that although the accused had committed actions which caused the deaths of the 2 children, she was guilty but insane.

46. That case clearly illustrates that even though an accused may be fit to plead, the said mental assessment does not deprive the accused of the defence of insanity.

Discrimination

47. Pursuant to **Article 27** of the **Constitution**;

"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental rights."

48. In the circumstances, it is well settled that all persons are equal before the law and they are entitled, without discrimination, to the equal protection of the law.

49. The Petitioners have pointed out that whilst persons charged with the offence of Murder are required to go for mental

assessment prior to taking plea, persons who are charged with other capital offences do not go for mental assessment.

50. Based upon the death penalty, which is the prescribed sentence for the capital offences, the Petitioners submitted that it was discriminatory to demand mental assessment only for those charged with the offence of Murder.

51. In order to appreciate the Petitioners' case, we must first understand the meaning of the word *"Discrimination"*.

52. Black's Law Dictionary, 8th Edition defines

"discrimination" as follows;

"The effect of a law or established practice that confers privileges on a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

53. Nyamu J. (as he then was) had occasion to define the word discrimination in **NYARANGI & 3 OTHERS Vs**

ATTORNEY GENRAL [2008] KLR 688. The learned Judge expressed himself thus;

"The law does not prohibit discrimination but rather unfair discrimination. The said handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."

54. He went on to further state that;

"The principle of equality and non- discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:-

(i) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and

(ii) Are reasonable in the light of their legitimate aim."

55. In this case, the basis for the differential treatment is the nature of the offence.

56. Whilst the sentence prescribed for capital offences is the same; namely the death penalty; the nature of the offences are not the same.

57. If the persons charged with offences whose ingredients were the same, were accorded differential treatment, that would constitute an unjustifiable differentiation; hence it would amount to unfair discrimination.

58. In my considered opinion, the similarity in the sentence prescribed for 5 different kinds of capital offences, does not render the persons charged with such offences to be of one defined class of accused persons.

59. However, that does not deviate from the acknowledgement that all persons are entitled to fairness and equality before the law. Nonetheless it is well settled that equality cannot be confused with uniformity. That is why, for example, under **Article 27 (6)** of the Constitution, the State is clothed with authority to take legislative and other measures, including affirmative action programmes and policies which are designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

60. The very essence of affirmative action programmes is inequality, as such programmes give more to the hitherto disadvantaged individuals or groups.

61. Affirmative action acknowledges that uniformity would be an enemy of equality; and it is therefore embraced as a means of uplifting those who had been disadvantaged, so that their dignity can be at par with other persons.

62. If affirmative action was not applied in circumstances where it was necessary, that may be deemed discriminatory.

63. In **JACQUELINE OKEYO MANANI & 5 OTHERS Vs**

ATTORNEY GENERAL & ANOTHER, PETITION NO. 36 OF 2018, Mwita J. held as follows;

"29. The Constitution advocates for non-discrimination a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice, without unreasonable distinction or differentiation.

It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination.

Discrimination …... will be deemed to arise where equal classes of people are subjected to different treatment, with objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."

64. In my considered opinion, the reason why an accused person who is charged with the offence of Murder ought to undergo mental assessment prior to taking a plea is that from the outset, the prosecution provides the Court with information concerning the mental status of the accused. If the accused is unfit to take plea, the Court would make an informed decision about how the proceedings would be conducted.

65. It is all very well to presume that every accused person was sane, but the reality might be different.

66. The Court is ordinarily presided over by a Judge or Magistrate; whose professional qualification is on matters of law. Therefore, the Court would most probably have no professional qualification to ascertain the mental status of the accused. The proceedings would go ahead, on the presumption that the person on trial was sane.

67. In the event that it later transpired that the accused did not even understand the charge, due to a disease of the mind, it is conceivable that his right to a fair hearing would have been violated. I so hold because pursuant to **Article 50 (2) (b)** of the **Constitution**,

"Every accused person has the right to a fair trial, which includes the right –

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer to it. ……………………"

68. If an accused person was suffering from a disease of the mind, he might be unable to understand the charge or to follow the proceedings.

69. And whereas all accused persons have the same right, why was it only those charged with the offence of Murder who are subjected to mental assessment, prior to taking plea"

70. As the Respondents have pointed out, it is the offence of Murder that has as one of its ingredients, proof of malice aforethought.

71. None of the other capital offences has the requirement that the prosecution must prove malice aforethought.

72. Therefore, the offence of Murder is unique, in that respect. In the circumstances, when it is only in respect of persons accused

of Murder, that there is a requirement of mental assessment prior to the taking of a plea; I find that the said requirement is not discriminatory. It is simply a requirement in respect of a person facing a charge for an offence which has a unique ingredient; Malice aforethought.

73. In the result, I declare that the said requirement is not unconstitutional.

74. However, in real terms the process does lead to delays in many instances, especially because there is a very small number of medical professionals available in Kenya, who carry out the exercise of mental assessment.

75. The said delays are most regrettable, and must be addressed by the relevant Government organs.

76. But the delays, of themselves, cannot render the requirement unconstitutional.

77. One more thing requires my attention: Self-incrimination.

78. The Petitioners submitted that they were being forced to give self-incriminating evidence, when they are compelled to undergo mental assessment.

79. Pursuant to **Article 50 (2) (L)** of the Constitution, every accused person has the right to refuse to give self- incriminating evidence.

80. Therefore, an accused person cannot be compelled to give self-incriminating evidence.

81. In my understanding, the mental assessment is conducted prior to the taking of plea. The results are made available to the Court, the prosecution and the defence, before the commencement of the trial.

82. In a strict sense, therefore, the results of the mental assessment are not adduced in evidence, to advance the case for the prosecution. It is information which enables the Court to become aware about whether or not the accused was fit to take plea.

83. However, should an accused person hold the view that the report on his mental assessment would be tantamount to self-incriminating evidence, I find that he would be entitled to inform the Court about that position.

84. I take the position that when the accused expressly declines to undergo mental assessment, the Court would have to make a decision about whether or not to proceed with the trial on the basis of the legal presumption of sanity.

85. It must always be borne in mind that an accused person may not even be aware that he had a disease of the mind, which made him unable to know that what he was doing or that what he was doing was wrong.

86. Although it would be a very difficult decision, the Court would have to make it, when an accused person adamantly rejected the requirement of mental assessment prior to the taking of a plea, in a case in which the accused was facing a charge of Murder.

87. I venture to suggest that the person who refused to

undergo mental assessment should give his reasons, and the same should be recorded by the Court. I suggest that one of the questions that the accused should answer is whether or not he considers himself to be sane and fit to stand trial.

88. In the final analysis, the Petition fails, and it is dismissed.

89. As regards costs, I order that each party should meet his or her own costs, as this was a public-interest litigation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF JANUARY 2022

FRED A. OCHIENG

JUDGE

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