



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 11 OF 2015

SILAS CRISPUS OBURA alias PROFESSOR.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The petitioner, SILAS CHRISPUS OBURA Alias PROFFESSOR was charged with the offences of Robbery with Violence contrary to section 296(2) of the Penal code and rape contrary to section 140 of the Penal Code (Cap 63 Laws of Kenya) at the Senior Resident Magistrate's court at Maseno, where he and another person were convicted and sentenced to death sentence and 10 years respectively.

2. An appeal was filed by the Petitioner and his co-accused person at the High Court at Kisumu vide High "Court Criminal Appeal No 109 of 2014, wherein the offence of Rape was quashed and the sentence of ten (10) years imprisonment imposed on them set side. Their appeal against the conviction and death sentence for the offence of Robbery with Violence but the same was dismissed and the sentence reaffirmed.

3. They preferred another appeal vide Criminal Appeal No. 102 of 2007 at the Court of Appeal in Kisumu but it was also dismissed in a judgment delivered on 27th June, 2008. Later the death sentence was commuted to life imprisonment.

4. Pursuant to the provisions introduced in the Constitution 2010 vide Article 50 (6) (a) and (b) with regard to criminal law , the petitioner herein has petitioned challenging the fairness of his trial at the magistrate's court in his petition (amended) dated 26th October 2015 and supported by his affidavit sworn on 15th October , 2015 and filed on 27th October , 2015. In this petition, the petitioner seeks an order for a re-trial of his case being MASENO SENIOR RESIDENT MAGISTRATE'S CRIMINAL CASE NO. 803 OF 2003, (REPUBLIC VRS SILAS CHRISPUS OBURA Alias PROFESSOR).

5. According to the Petitioner, the trial magistrate's court at Maseno, Senior Resident Magistrate's Court Criminal case No 803 of 2003, REPUBLIC VRS SILAS CHRISPUS OBURA Alias PROFFESSOR ,was in breach of the provisions of Article 50 (2) (c), (i) and (k) of the Constitution of Kenya, 2010 in that;(verbatim):

(a) It failed to order that prosecution to supply your humble petitioners in advance of the trial all the evidence the prosecution were to rely on.

(b) In the result the prosecution did not supply your Humble petitioner with the statements of the witness and all the exhibits in advance before the aforesaid trial.

(c) Failure to supply witnesses statements and exhibits presented your Humble Petitioner adequate time and facilities to prepare his defence; and

(d) Your Humble petitioner could not challenge the evidence which was adduced and in respect of which he had not been informed in advance and which was eventually relied on by the prosecution, and

(e) Your Humble Petitioner did not have reasonable access to the prosecution's evidence

6. That there is no now new evidence which was not available at the time of the trial and which is compelling, which would have been admissible at the trial of your humble petitioner.

That this evidence is of high probative value and capable of belief and which if adduced at the trial of your Humble petitioner would probably have led to a different verdict.

7. Mr Olaba, counsel for the petitioner filed their written submissions together with a list of authorities. And while the Respondent's counsel was given time to file their written submissions, failed to do so but agreed with the petitioner's counsel that a date be fixed for highlighting of submission. On 27.7.2017, Mr Olaba indicated to court that both parties had filed their respective submissions which they were opting to rely on. The Respondent had not filed any response to the petition or written submissions.

8. According to Mr. Olaba, counsel for the petitioner, upon receiving instructions from the petitioner, his counsel travelled to Maseno police station where he went to the Officer Commanding the said station and requested for the perusal of police file in respect of Criminal Case No.803 of 2003 (REPUBLIC –VRS- HOWARD SHIKANGA OSOYI alias KADOGO and SILAS CHRISPUS OBURA Alias Professor (The petitioner). He stated that in the said police file, he found statements of BEN ONESMUS OTIATO, BENJAMIN EMISIKO and RAPHAEL ODUMBU which were made to the police and were not supplied to the petitioner before or during the original trial. Also not supplied to the petitioner for his trial were the occurrence book entries on the police officer's interview with the complainant in hospital, on petitioner's arrest and medical examination form (P3 form).

9. Mr Olaba said that while Ben Onesmus Otiato and Benjamin Emisiko identified the petitioner as one of the complainant's attackers during the trial, their statements to the police made no mention of this his. As for Raphael Ondumbo, the complainant's father and one who complained of the incident to the police, it came out that his said daughter did not name the petitioner as one of her attackers to him and stated that she had been assaulted by unknown persons.

10. Also, Mr Olaba submitted that the occurrence book entry on the police officer's interview with the complainant in hospital indicates that the complaint, when describing her attack, did not mention the name of the petitioner as one of her assailants and neither did she make any reference to having been violently robbed.

11. Further, Mr Olaba submitted that in OB No.7 of 20th October, 2003 there was no mention of the petitioner and that he was only identified by the complainant after his arrest. Then, on the P3 form, Mr Olaba submitted confirms a number of inconsistencies being in the date the incident was reported to the police and details of the offence.

12. For this, Mr Olaba submitted that the petitioner seeks to invoke his constitutional right under Article 50 (6) (a) and (b) of the Constitution for a new trial since the new evidence was not available to the defence at the trial and the same was not within the knowledge of the petitioner as it had not been made available to him.

13. That the new evidence having come to light, it is Mr Olabas' submission that the same directly undermines the credibility of the three witnesses in this case, the court's decision having been hinged on their accounts and hence casts doubts on the safety of the petitioner's conviction and sentence.

14. Mr Olaba went on to submit that the new evidence supports the petitioner's claim that he was not identified by the complainant nor Mr Otiato Mr Emesiko or the complainant's father at the time of the attack. Also, the petitioner, it is submitted as a victim of mistaken identity since his name in the police report by the complainant was entered a day after his arrest.

The Respondent neither filed a response to the petition nor submissions.

15. I have considered the grounds of the petition, the submission by the petitioner's counsel, cited authorities and the law. I have also evaluated the proceedings, the record from the lower court, High Court and Court of Appeal. I consider the issues for determination to be:

(a) whether or not the petitioner's right to fair trial was violated during the trial,

(b) whether the petitioner suffered prejudice as to vitiate the trial as a result of the violation, if at all;

(c) whether, a re-trial is necessary in the event

16. Article 50 (6) of the Constitution provides as follows;

“ A person who is convicted of a criminal offence may petition the High court for a new trial if :-

(a) The person's appeal , if any has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal with in the time allowed for appeal and

(b) new and compelling evidence has become available.

17. This Constitutional provision has ushered in an extended attempt by persons convicted and serving sentence to test the validity of the trial and evidence upon which they were convicted and the integrity of the prosecution in the hope to satisfy public sense of justice. I say so because a literal serious reading of the Article provides a mechanism through which Article 25 (c) of the Constitution is tested and stretched to its fullest. It provides as follows;

“ Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited;

(a)

(b.....)

(c The right to a fair trial.

(d.....)

18. The provision also provides a means to measure whether the threshold to accord an accused information under Article 50 (2) (c) as regards adequate facilities to prepare for defence and Article 50 (2) (j) to be furnished with evidence as read with Article 35 which has liberalized access to information especially if the same, if withheld did compromise the integrity of the trial, the result of which would compromise public confidence in judicial process. This is the reason Article 157 (11) of the Constitution was enacted to cloth the Director of Public Prosecution to guard against abuse of the process of court. This Article provides that:

“ In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process”

19. Applying all these provisions as regards Article 50 (6) (a) and (b), the following stands out as what is communicated to the public for their consumption.

(i) For a convict who is serving sentence to benefit from the provision, he or she must demonstrate that is serving sentence after conviction. This is when the right to petition accrues.

(ii) The person must be a convict and serving sentence and has failed to appeal and time for appealing has lapsed;

(iii) The person is convicted and is serving sentence after the highest court in the land to which he could appeal has confirmed (upheld) the sentence.

(iv) the convict who is serving sentence has come across new and compelling evidence has become available

20. Once a party is satisfied that it has evidence that falls within the two categories than the party qualifies to petition the court. What the court has to note on its part is that it has not been asked to examine the evidence on which the petitioner was convicted on and/or whether the trial courts and especially the court of appeal erred or not. This is because the evidence which has become available was not before the trial court or any of the appellate court.

21 The court’s jurisdiction is limited to assessing the relevance of the evidence that has been discovered. Under the rule of “stare decisis”, the High Court is bound by the Court of Appeal. Therefore in making orders, it cannot purport to set aside or do anything to the decision save to refer the case back to the trial court with instructions limited to the evidence now available.

22. As for the petitioner, he or she is not relieved of his /her status rather he/she remains a convict whose sentence is still running. Litigants are therefore called upon not make their pleadings and prayers such that they do not seek a review of the conviction and sentence. They remain convicts who are serving sentence until the trial court carries out the direction given to it by the High court exercising this special jurisdiction.

23. Having carefully read through the decisions filed before this court and the submissions , two difficulties arise which the court in exercising this special jurisdiction have been facing. The first obstacle is traced to the petitioners. A lot of discussion goes into casting doubt on the evidence already tendered. The duty a petitioner is limited to is expousing the benefit his/her discovery if the new evidence and or facts relate to the concluded trial. It is that court which has jurisdiction to review its own findings to what extend the new facts affect the evidence as a whole if the same has become admissible and the prosecution to justify exclusion of the evidence.

24. The court is informed that the occurrence book (OB) reports which had less details were not tendered in evidence. The question here becomes, is the occurrence book (OB) in the class of evidence which whether one used due diligence before trial would not have access to?

25. The explanation here begins with the accused expected to satisfy court that even due diligence would not have availed the evidence because the custodian had the sole discretion to keep the information. So, to implicate the prosecution, a petitioner ought to show that all efforts had been made without success. This would be demonstrated with letters written to the prosecution which would display delay or applications before the trial court to confirm the petitioner made efforts to get the said information, and in that the petitioner becomes the party to discharge the burden.

26. I have perused the record of the amended petition and annexures attached thereto. None supports the case of the petitioner. However, the prosecution on the other hand has not rebutted the fact that evidence was not in their possession or that the occurrence book numbers that have been presented or referred to were indeed not available .

The other aspect to be avoided is to attempted to cast doubt on the evidence already tendered hence this confines a petitioner to proving the relevance.

27. This court was also invited to look at the P3 form (medical) evidence and what become of interest is when the alleged incidence was reported and when it happened and the alleged offence. The P3 form (medical) evidence which was issued to Stella Ondumbu the offence of Robbery with Violence was not recorded. The charge sheet shows that the petitioner was arrested on 27th October, 2003 whereas the P3 form was filled on 29th October 2003. The apprehension here is that the complainant might have been coached on what to record.

28. I have scooped the record for any explanation of whether there is information on why the record was not availed like any other evidence which was relied upon. I have seen none. I have also searched the judgments of the trial court and the appellate courts for any complaints as regards the reason why evidence relied on by the prosecution omitted the sought information. There is deafening silence over the issue.

29. The public will not suffer any prejudice for an order to test the new information and or evidence at cross -examination.

For the reasons advanced herein, the petition is allowed and the following orders issued;

(a) The amended petition dated 11th June, 2015 be and is hereby allowed;

(b) the case be and is hereby remitted to Maseno Law Courts for a court seized with competent jurisdiction to allow for fresh evidence related to the occurrence books No 5 of 27/10/03 and No. 7 of 20/10/03, P3 form (medical evidence) dated 20th /10/2003 to be admitted in evidence and the investigating officers and doctor /clinical officer to be cross examined on the same.

(c) the trial court which will be seized with the retrial proceedings to be at liberty to review the judgment herein, if need be

It is so ordered.

Judgment delivered, signed and dated this 24th day of July,2019.

LADY JUSTICE D. O. CHEPKWONY