REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CR. APPL. NO. 16 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 50 (6) (a) OF THE CONSTITUTION OF KENYA

DAN MELY MAGANGA.....1ST APPLICANT

JOHN ODHIAMBO ADUNDO.....2ND APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Applicants, **DAN MELY MAGANGA** and **JOHN ODHIAMBO ADUNDO**, have invoked the provisions of **Article 50 (6) (a)** of the **Constitution of Kenya** in seeking orders for *"a new re-sentencing trial."*

1. They told this court that they had been convicted for the offence of **GANG RAPE**, and that they had been sentenced to 20 years imprisonment, each.

2. The Applicants lodged appeals at the High Court, but the same were dismissed.

3. Finally, the Applicants lodged appeals at the Court of Appeal, but the said appeals were also dismissed.

4. As at the time when the Applicants moved this court, they had already been in custody for a period of eight (8) years.

5. In their considered opinion, the period which they had served in prison was sufficient deterrence.

6. They submitted that under the **Constitution of Kenya, 2010**, we are moving away from retributive justice to restorative justice.

7. Whilst they have been in prison, the Applicants have undertaken some courses. Therefore, they believe that they would be more useful to the society and to themselves, if they were outside prison, than if they remained behind bars.

8. It is because of that belief that the Applicants requested the court grant an order that would enable them to be re-sentenced.

9. In answer to the application, the Respondent submitted that following the conviction of the Applicants, they no longer have the benefit of the presumption of innocence.

10. According to the Respondent, the onus was on the Applicants to persuade this court to upset the lawful decisions which had been rendered by the trial court, the High Court and the Court of Appeal.

11. The Respondent submitted that **Article 50** of the **Constitution** seeks to balance the Public Interest, in having finality in Criminal Cases, on the one hand, whilst, on the other hand ensuring that innocent persons do not suffer an injustice if new and compelling evidence became available.

12. Mr. Muia, learned state counsel, submitted that the Applicants had failed to demonstrate that there was any new and compelling evidence, which could give rise to a re-trial.

13. In the circumstances, the Respondent submitted that this court lacks the jurisdiction to order for the re-sentencing of the Applicants.

14. Mr. Nyamweya, the learned advocate for the Applicants, submitted that pursuant to Article 50 (6) of the **Constitution,** the Applicants could seek re-sentencing.

15. In his understanding, that provision of the Constitution contemplates any other form of trial, including re-sentencing.

16. He also said that this court has the power to obtain the records kept by the Prisons Department, concerning the Applicants, and thus be able to verify that the Applicants had been rehabilitated.

17. In the considered opinion, the Applicants did not have to prove they have exhausted the appeal processes available to them, and also that they have new evidence.

18. Indeed, the Applicants made it clear that they do not have any new evidence.

19. As far as they were concerned, when they had exhausted the appeal processes which were available to them, under the current legal system, they were entitled to move the High Court, seeking an order for re-sentencing.

20. The starting point in determining this application is **Article 50 (6) (a)** of the **Constitution,** as that is the foundation upon which the application was advanced. The said provision reads 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 dismissedby the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available."***

21. In the light of the express wording of **Article 50 (6)** of the **Constitution**, a retrial may be ordered if 2 requirements are met. The said requirements are not in the alternative, as has been suggested by the Applicants.

22. The requirements must both be met, before the application for a re-trial can be granted.

23. Therefore, when the Applicants confirmed that no new evidence was available, that was sufficient to conclude the matter, because in the absence of new evidence, the Court cannot order for a re-trial.

24. Secondly, it is well settled that if any party had sought orders from the court, the said Applicant has the onus of providing the Court with all the requisite material which would satisfy the said court that the orders sought were deserved.

25. It is not the responsibility of the court to set out, searching for factual evidence or other material, that would enable it make an informed decision.

26. If the Applicants believed that the records maintained by the Prisons Department were useful, the said Applicants ought to have made available the records relevant to the matter at hand.

27. Finally, the fact that a convicted person feels that he has been adequately punished, or that he has been sufficiently reformed, cannot be a basis, in law, to justify an order for re-sentencing.

28. When the appellate Courts upheld not only the Applicants' convictions but also their respective sentences, that was tantamount to a confirmation that the said sentences were lawful and appropriate.

29. Accordingly, I find no merit in the application: it is therefore dismissed.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **18th** day of **December** 2019

FRED A. OCHIENG

JUDGE