



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**PETITION 5 OF 2016**

**ALBERT MAGU MUSA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**FACTS**

1. The Petition is brought under the provisions of Articles 22, 23, 20(6), 35 and 50(6) of the Constitution of Kenya 2010 and all other enabling provisions of the law; the Applicant prays for the following Orders;

- a) **An order be issued reversing the summary dismissal of his appeal and that the same be ordered heard on merit.**
- b) **An order of compensation for the breach be ordered.**
- c) **Costs of the Petition.**

2. The Petitioner relied on the grounds on the face of the Petition and the Supporting Affidavit made by the petitioner and dated the 8<sup>th</sup> June, 2016.

3. At the hearing hereof learned counsel Mr Nderi appeared for the petitioner and Mrs. Gicheha appeared for the respondent and both Counsels put in written submissions which they also highlighted;

4. Hereunder are the parties rival submissions;

**PETITIONERS SUBMISSIONS**

5. The Petitioner was charged in SRMCR Case No. 890 of 1991 with three counts related to obtaining land registration of land parcel Baragwi/Guama/493 by false pretenses contrary to Section 320 of the Penal Code; uttering a false document contrary to Section 353 of the Penal Code and forgery contrary to Section 349 of the Penal Code; he was convicted and sentenced on three counts and being aggrieved and dissatisfied with his conviction and sentence he lodged an appeal at the Nyeri High Court being case number HCCRA. No.112 of 1993 which was summarily rejected and dismissed under the provisions of Section 352 of the Criminal Procedure Code; his contention is that he was never notified of the dismissal and only learnt about it long after he had served his term; that the failure to be notified amounted to a fundamental breach of his right to a fair trial;

6. His submitted that Section 352(2) of the Criminal Procedure Code lays out what is required of the appellate court when it summarily rejects an appeal; the section provides as follows;

***“Whenever an appeal is summarily rejected a notice of such rejection shall be given to the DPP, the appellant or his advocate.”***

7. That the respondent has not demonstrated that the appellant was notified of the rejection of his appeal; and that had he been informed he would have taken remedial action to impeach the finding;

8. That he lodged applications in the Court of Appeal seeking extension of time to lodge an appeal against the summary dismissal; the applications were disallowed;

9. The petitioner has tried to vindicate his rights through the appellate process but has been unsuccessful; and therefore has filed this instant

petition; his prayer is for this court do invoke its power under the provisions of Articles 50(6) and do revoke the errors and do order for a new trial so that the petitioner's rights are redeemed.

10. The above Article 50(6) is under pinned by the common law right developed by the Kings Bench Division known as "*coram nobis*" which gives a court powers to intervene where necessary; and it gives the court power to direct a court of law to review its judgments predicated on alleged errors of fact not apparent at the time but became pertinent after the fact;

11. The definition of a trial as defined by the Halsbury Laws of England includes an appeal or any process that leads to a determination; the petitioner humbly submitted that the appeal filed in HCRA 112 of 93 amounted to a trial as contemplated under Article 50(6);

12. That it was incumbent upon this court to determine whether there was an error which occurred and as a result the petitioners right to a fair trial was breached so as to require intervention by this court under the aforementioned Article;

13. The petitioner reiterates that the summary dismissal was never brought to his attention; neither is there evidence that his erstwhile lawyer was notified of this fact; that this is compelling new evidence that should allow a new trial under Article 50(6);

14. Such circumstances call for the court to revoke the errors and ensure the Petitioners rights are redeemed.

### **RESPONDENTS SUBMISSIONS**

15. In response the Respondent relied on its Replying Affidavit; an appeal HCRA No.112 of 1993 was filed at the Nyeri High Court and it was summarily dismissed; that the petitioner was well represented by an advocate who ought to have known the next stage and sought redress against the judgment but failed to do so; thereafter the petitioner went to the Court of Appeal and filed Criminal Application Case No.1 of 2008 seeking extension of time within which to file an appeal; this was done after fifteen (15) good years; he had been imprisoned for two (2) years and after leaving prison never followed up his advocate and woke up after fifteen (15) years and decided that he ought to appeal;

16. A single judge and full bench of the Court of Appeal dismissed the applications due to the fact that the petitioner had failed to give satisfactory reasons for the undue delay; the delay was found to be inordinate and the application an afterthought;

17. The petitioner then filed a Constitutional Petition No.2 of 2014 at the Kerugoya High Court which was brought under the provisions of Article 50(6) which petition was dismissed for being incompetent and for failing to meet the test of law;

18. He proceeded to appeal the above judgment at the Court of Appeal vide CA No.64 of 2015; which was also dismissed for lack of merit and for incompetency;

19. He then proceeded to file this instant petition under the provisions of Article 50(6) but has not demonstrated any new evidence other than what he presented before at Kerugoya High Court; that the petitioner had been court hopping and did not know what he wanted; that he had been heard by many courts and that all these courts couldn't have all been wrong in dismissing the various and many applications;

20. The respondent prayed that the Petition be dismissed.

### **REJOINDER**

21. The petitioner was not appealing against the various applications; that the issues be treated as different; there is a specific violation which has the backing of the law at Section 352 (A); the record shows that what is before the court is new and compellable evidence under Article 50(6) and he seeks to vindicate the violation that he never came to court to have his appeal determined on merit.

### **ISSUES FOR DETERMINATION**

22. Taking into consideration the above submissions this court has framed the following issues;

(i) Whether there was failure of notification of the summary rejection of the appeal in violation of the petitioners fundamental right to informatio;

(ii) Whether the petitioner has properly invoked Article 50(6) to warrant a retrial;

### **ANALYSIS**

**Whether there was failure of notification of the summary rejection of the appeal in violation of the petitioner's fundamental right to information;**

23. The petitioner in Petition No.2 of 2014 had been faulted for filing a petition that lacked specificity; it is noted that this Petition is brought under the provisions of Article 35 and 50(6) of the Constitution 2010; and that he has stated clearly the nature and extent of the infringement;

24. That upon his conviction he was incarcerated and had instructed the firm of Nyawira Gitonga & Company Advocates to file an appeal in

the High Court at Nyeri; which appeal number HCRA 112 of 1993 was duly filed; his contention was that this appeal was summarily dismissed and that no timely notification of the same had been issued either to him or his advocates as provided for under the provisions of Section 352 of the Criminal Procedure Code;

25. The fundamental breach of his right he contends emanates from the failure of timely notification by the court; that the mandatory statutory criteria of informing him of the fate of the appeal abridged his right to a fair trial; that his right to access information had been impeded upon by those in charge; he was therefore unable to pursue an appeal against his conviction and sentence by the subordinate court where an unfair trial had been conducted by the subordinate court; therefore his constitutional rights had been infringed;

26. Article 35(1) of Constitution 2010 entitles every citizen to the right to access information from the State; while Article 35(1)(b) entitles a citizen to information held by another person and required for the exercise or protection of any right or fundamental freedom;

27. Indeed the petitioner may not have been in a position to have had knowledge of the summary dismissal of his appeal as he was already incarcerated and was serving out his sentence and may thus have been unable to timeously seek redress against the summary rejection of his appeal; but the burden of satisfying the conditions of Article 35(1) (b) of the Constitution 2010 lies with the petitioner; the petitioner must demonstrate that this right was indeed breached;

28. The record shows and he admits to having been imprisoned for a period of two (2) years and he admits to having asked his advocates on the status of the appeal; that this was done upon his release and upon having completed his sentence; he also confirms that he had issues with his erstwhile advocates; it was only after the firm closed shop that he discovered that the appeal had been summarily dismissed; that he even filed a complaint against the said firm with the Advocates Complaints Commission and the complaint was determined on the 30/08/2007;

29. The question that begs an answer is how long did the above process take and who then should take the fall for failing to notify the petitioner thus denying him the vital information that would have enabled him to timeously seek redress against the summary rejection of his appeal? this court reiterates the burden lies with the petitioner;

30. The petitioner himself states that he had engaged the firm of Nyawira Gitonga & Company Advocates to represent him; that they closed shop before he knew the status of his appeal; that he lodged a complaint against the firm of advocates which complaint was determined; but the record shows that the petitioner did not annex any documentary evidence to the affidavits made in the Petition of any formal request made to his advocates; nor the complaint made to the Advocates Complaints Body nor was the communication of the determination annexed;

31. The Evidence Act at Section 107 places the burden of proof of a legal right on the person asserting that right; it is this court's considered view that without evidence on the nature of the Complaint and the determination reached it would be difficult or impossible for this court to absolve the advocates from blame; that in the absence of such material it shall never be known whether such notice was sent to and received by the applicants advocates then on record; it was incumbent upon the petitioner to avail the complaint and the determination which he failed so to do; therefore this court finds no reason to apportion blame on the respondent when vital evidence is missing;

32. It is also interesting to note that the petitioner states that he was incarcerated for a period of two (2) years which period would have been found to be excusable; but it took him a period of five (5) years to file an application for enlargement of time within which to lodge an appeal against the summary rejection of his appeal; it brings to the fore the question as to whether the petitioner was indolent as the discovery may actually have been after five (5) years; the Court of Appeal vide a single judge and a full bench dismissed both of the petitioners applications for enlargement of time due to the fact that the delay was inordinate; by reason of the forgoing the fact that the petitioner may have been indolent in pursuing and initiating the appeal process cannot be ruled out and that this instant petition may have indeed been filed an after-thought;

33. Nevertheless in the light of the evidence adduced this court is satisfied that there is insufficient evidence to demonstrate that the petitioner's right to information in the form of a notification was violated.

***Whether the Petitioner has properly invoked Article 50(6) to warrant a retrial:***

34. Article 50(6) donates power to the High Court to order for a retrial and 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 within the time allowed for appeal, and**

**(b) New and compelling evidence has become available.**

35. The petitioner submitted that this court must first try the issue of the appeal filed in HCRA 112 of 1993 whether it amounts to a trial as contemplated under Article 50(6); and it was his humble view that a trial as defined by Halsbury Laws of England includes an appeal or any process that leads to a determination; and therefore the appeal filed by and on behalf of the Petitioner properly belongs to the rubric of trial contemplated under the Article 50(6);

36. That it was his humble submission that what is before this court is new and compellable under Article 50(6) and he seeks to vindicate the violation that he never came to court to have his appeal determined on merit.

37. Therefore this court must also determine if the discovery of the violation of the Petitioner's right to a fair trial was new and compelling evidence and whose discovery can only be remedied by the intervention of this court under the relevant Article;

38. In addressing the above this court states that the Article envisages that there must be new and compelling evidence which must be recent in origin and recently discovered and was not known or available at the time of trial or at the hearing of the appeals; and could not be obtained even after due diligence was exercised by the petitioner; the petitioner must demonstrate that the new evidence is admissible and credible and not merely corroborative; and must also demonstrate that new evidence available is strong and convincing enough to persuade a new trial court to reach an entirely different decision than that already reached; this court relies on the case of **Wilson Thiriba Mwangi vs DPP JR No.271 of 2011 (Nairobi)**;

39. The above notwithstanding this court has already made a determination that there was insufficient evidence to demonstrate that there was indeed a violation of the petitioners rights; therefore it follows that there is no new and compelling evidence arising from an error that requires this court to intervene under Article 50(6) of the Constitution 2010.

40. Secondly Article 50(6) of the Constitution is twofold in that it is not only founded on the discovery of new and compelling evidence but also on the failure to timeously file an appeal out of time; in this regard the record shows that this latter part was exhaustively dealt with by the Court of Appeal and the delay of five (5) years in seeking a reprieve was found to be inordinate;

41. All in all this court concurs with the observations made by learned counsel for the respondent who strenuously opposed this petition, that the same is not made in good faith and is an afterthought.

#### **FINDINGS AND DETERMINATION**

42. For the forgoing reasons this court finds that there is insufficient evidence to demonstrate the existence of a violation of the petitioners right;

43. That no new and compelling evidence as envisaged under Article 50(6) has become available; and finds that this not a suitable case for this court to grant the orders sought.

44. The Petition is found to be lacking in merit and is hereby dismissed; with no order as to costs.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 20<sup>th</sup> day of March, 2018.**

**HON.A.MSHILA**

**JUDGE**