



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC CRIMINAL CASE NO 5 OF 2016

ZEPHANIA OPANDE NYABUGA.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

Before me is an application by Zephania Opande Nyabuga received in this court on 30th July 2013. The application is entitled:-

“RE; APPLICATION FOR THE VIOLATION OF MY CONSTITUTIONAL RIGHTS UNDER ARTICLE 49 IN CRIMINAL FILE NO.281 OF 2007 AND 1580 OF 2008 KEROKA LAW COURTS”

In the body of the application the applicant states that he is an inmate in Kibos Main Prison serving a term of imprisonment of 16 years and that he petitions this court based on a violation of his rights. He urges this court to consider his application and make a fair decision. He then urges that the reasons for the application are contained in the supporting affidavit.

In the supporting affidavit sworn on 30th July 2013 the applicant deposes that his rights were violated because he was detained in Keroka police station for 18 days before he was arraigned in court. He deposes that before he was taken to the cells he was kept in the booking office for three days and that therefore the witnesses who picked him out at the subsequent identification parade had opportunity to see him. He deposes that for that reason he prayed for a new trial before the Chief Magistrate in Kisii but his application was refused. He therefore urges this court to allow his application.

The application was argued before me this morning. The applicant relied on his homegrown written submissions while Mr Ochieng for the state submitted orally whereupon I reserved this ruling for this afternoon.

The application and supporting affidavit are not very clear on the prayers sought by the applicant. However in the written submissions he states that his prayer is that his conviction be quashed and the sentence be set aside.

I have carefully considered the application, affidavit in support and the submissions of both sides. My finding is that the application has no merit. The applicant did not exhibit before this court any record from which it can decipher what offences he was charged with let alone the judgement by which he was convicted yet this application has been pending for five years. Secondly he contends in his submissions that his case was moved from one court to another but in his supporting affidavit he deposes that it was him who necessitated his file being taken to the Chief Magistrates when he asked for retrial.

Whereas Article 50 (2) (g) and 50 (6) of the constitution cloth the applicant with a right of appeal or review and a right of appeal to petition for a new trial respectively certain conditions must be fulfilled before the application can be granted. For a fresh trial the applicant must demonstrate that both new and compelling evidence has become available after the trial or appeal. In this case we do not even know whether the applicant ever appealed and he has not been forthcoming with such information. If the only reason he wishes to have the conviction quashed is because his right under Article 49 (1)(i) was violated that cannot be a basis for quashing the conviction and setting aside the sentence as the remedy for violation of rights lies in damages. As to the allegation that the complainant in his case did not turn up to testify that is not proved as he has not availed the proceedings of the lower court. Neither has he produced before this court any record that can warrant this court to come to a conclusion that his right to a fair trial was violated. On the whole therefore I find that this application lacks merit and it is accordingly dismissed.

Dated, signed and delivered in open court this 29th day of May 2018.

E.N. MAINA

JUDGE

29/5/2018

In Presence of:

Mr Ochieng – Prosecution counsel

The Applicant in person.

Court assistant Mobisa/Ojwang