

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CRIMINAL APPLICATION NO. 19 OF 2017

BETWEEN

RICHARD OLOO OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, **RICHARD OLOO OTIENO**, together with other accused were charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. They appealed against conviction and sentence to the High Court, being *Kisumu HCCRA No. 2012 of 2001* in which their convictions and sentences were set aside and a retrial ordered. The applicant and his co-accused were re-tried and duly convicted. They appealed against conviction and sentence before the High Court in *Kisumu HCCRA No. 232 – 234 & 241 of 2004*. The appeal was heard and dismissed. Undeterred, the applicant and his co-accused appealed to the Court of Appeal in *Kisumu Criminal Appeal No. 54 & 56 of 2007*. The Court of Appeal heard and dismissed the appeal.

2. After exhausting his appeal, the applicant together with one of his co-accused lodged a petition in the High Court at Kisumu being *Kisumu HC Petition (Criminal) No. 8 of 2014* under the provisions of **Article 50(6)** of the Constitution arguing that there was new and compelling evidence entitling them to a new trial. The court heard the application and found that the applicants had not proved that there was new and compelling to warrant a new trial.

3. In this application, the applicant contends that he is entitled to a new trial because he did not have a fair trial as the prosecution failed to call vital witnesses namely; the arresting officer, the medical officer and the investigating officer. In his view, the witnesses would prove that he was innocent. He also complained that this rights under **Article 49(c)** and **(f)** of the Constitution were violated.

4. The applicant reiterated this grounds in his oral submissions and urged the court to reconsider this case since he was facing a life sentence. Counsel for the respondent urged the court to dismiss the application as it was an abuse of the court process considering that the applicant had filed a similar petition which was heard and dismissed.

5. I find and hold that this application, in so far as it raises the same issues that were heard or ought to have been heard in *Kisumu Petition (Criminal) No. 8 of 2014*, is an abuse of the court process. The applicant cannot keep re-litigating matters that have been determined. I also note that the substantive issues raised by the applicant regarding the evidence were exhaustively considered by the two appellate courts that dealt with the matter. The learned judges in *Kisumu HCCRA No. 232 – 234 & 241 of 2004* expressed the view that;

[W]e are not convinced that in light of the above that the absence of the arresting officer and or investigating officer lowered the prosecution case since their role would have had move to do with filling in technical gaps which in our view would not have added much to the evidence of those present at the scene. The magistrate was right in our view to find that no prejudice was likely to ensure from the omission.

6. Likewise, the Court of Appeal, in *Kisumu Criminal Appeal No. 54 & 56 of 2007* expressed the view that;

In the circumstances of the case before us there is nothing which would remotely indicate to us that the appellants' conviction was not based on sound evidence. In our view the appellants' conviction was inevitable. The law under which they were convicted proved for a mandatory death sentence. Accordingly, we have no hesitation in dismissing the appeal.

7. For the reasons I have set out above, this application lacks merit and is abuse of the court process. It is dismissed.

DATED and DELIVERED at KISUMU this 27th day of April 2017

D.S. MAJANJA

JUDGE

Applicant in person.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.