



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL APPLICATION. NO. 28 OF 2014**

**JONA NGALA KILIMBI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. By an undated Originating Notice Of Motion filed in court on the 16<sup>th</sup> June 2014 expressed to be brought under **Articles 22(1) ,23 (1) 25 a c 48 and 50 of THE CONSTITUTION 2010**, the Petitioner prayed;

***1) This Hon. Court be pleased to declare that the applicant right to secure protection of the Law as provided for in Article 50(2) (a) of the Constitution of the Republic of Kenya has been breached and contravened by the Respondent.***

***2) This Hon. Court be pleased to declare that the charge of incest by male contrary to section 20(1) of the sexual offences Act, conviction and sentence meted upon me the applicant was not proved beyond reasonable doubt and they should set me free from prison forthwith cost of this application be provided for.***

2. That prayer emanates for the averments in the motion which gives the quarrel of the petitioner's with the justice system: The motion says that his trial before the subordinate court for the offence of incest ended on a conviction and sentence of imprisonment for 30 years. He appealed to the High Court in Mombasa HCCR.A No. 133 of 2007, which court after hearing the appeal dismissed the appeal on both conviction and sentence and upheld the decision by the trial court . He has now filed the originating motion in which he seeks the remedies sought on the basis of the complaints in the same motion.

3. We take note that the applicant acts in person and we shall treat his application as a complaint against his manner of trial before the magistrate's court because that is the basis of his complaint. We say so noting that there is no complaint directed at the handling of the appeal by this court.

4. In the affidavit in support of the motion, the petitioner does not allege emergence or discovery of new and compelling evidence as required by the provisions of Article 50(6) of the Constitution. In fact the motion does not invoke that provisions of the constitution that would entitle this court to relook the matter the petitioner having exhausted his chances of appeal.

Instead of proving the parameters of an application under Article 50 (6) the petitioner seeks to challenge the the courts which heard his case on purely matters of evidence and how that evidence was treated by

that court. In essence the petitioner is seeking to challenge the decision by the trial court as if the motion was a second appeal.

Looked at differently, the motion may be deemed to be an application against violation of rights by a trial court under Rule 4 of the Constitution of Kenya/Protection of rights and fundamental freedoms) practice and procedure Rules, 2013,

The rules provides:-

**19. (1) The Bill of Rights is an integral part of Kenya's democratic Rights and state and is the framework for social, economic and cultural policies. fundamental**

**(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.**

**freedoms.**

**(3) The rights and fundamental freedoms in the Bill of**

**Rights—**

**(a) belong to each individual and are not granted by the**

**State;**

**(b) do not exclude other rights and fundamental freedoms not**

**in the Bill of Rights, but recognized or conferred by law,**

**except to the extent that they are inconsistent with this**

**Chapter; and**

**(c) are subject only to the limitations contemplated in this Constitution.**

5. The motion vaguely seeks the calling of the trial court file for purposes of this court's perusal and satisfaction as to the legality, correctness and propriety of the findings and sentence at trial. This can be seen as an application under section 362 Criminal Procedure Code as read with Article 50(7) of the constitution.

6. We take, from the onset, the view that our jurisdiction in a petition under **Article 50(6)** is a special and peculiar one and confined to the dictates of the provisions of the Constitution. **Article 50(6)** provides:-

**“ (6) 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**  
**1(b) new and compelling evidence has become available.”**

7. We have carefully read the originating Notice of Motion and the affidavit filed by the petitioner as well as the written submissions. We have also taken into account, the oral submissions offered by the petitioner and the state at the hearing.

8. The totality of the Petitioners position in the paper filed and his oral submissions at trial, in summary, is that his trial was in breach of his right to a fair trial which entail being presumed guilty till proved otherwise and that the case presented by the prosecution never proved the complainants age hence proof to the requisite standards was never met.

### **Determination and reasons:**

9. We have pointed out that as worded and presented, the petitioners petition is largely anchored on the alleged breach of his right to a fair trial and the fact the ingredients of the charge, being age, was never proved to the requisite standards. To that extent the petition is largely an appeal against the finding of the trial court and not a petition for retrial. It could however pass for a motion for revision. We shall give the matter the best consideration in the circumstances the difficulties notwithstanding. We have anxiously considered the application and come to the following conclusion.

### **Application for retrial under Article 50(6)**

10. In so far as there is no evidence that the applicant ever appealed against the judgment on appeal dated by M.Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6) regard being had to the provision of Article 159 (2) and Rules 3(5) & 8(7) the constitution of Kenya/Protection of Rights and Freedom)Practice and Procedure Rules, 2013. We say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1st prerequisite under Article 50(6) 1 a has thus been met.

11. However the second requirement of emergence of new evidence and is conspicuously lacking and therefore the applicant for retrial must fail. We find that unless there is proved emergence of new and compelling evidence no application lies under Article 50 (6)

### **Second appeal:**

12. It is a cardinal principle of administration of justice that litigation must come to an end and that a court having determined a matter on the merits becomes *functus officio* unless an order of retrial is made by an appellat court.

13. In the instant case the application did appeal to this court in High Court Criminal Appeal no. 133 of 2007 which appeal was heard and determined on the 8.10.2010.

14. All the questions the applicant now raises against the judgment and decision by the trial court were matter within his knowledge and the record at the trial of the appeal and were thus actually alive for determination. It would be an act in perversion of due process to reopen the case on the same facts. This court would in that event be sitting on a second appeal or parallel one to the one already determined. If that would be to be allowed, then the efficient and proportionate dispute resolution as a principle to the constitution shall have been loss or just flouted. It thus follows that it would perverse to treat this matter as a second appeal.

### **Review under section 362**

15. The jurisdiction to review and the courts power to review are wide and are now anchored on Article 165(7) of the constitution. However there are set parameters once has to fit into before court can entertain an application for revision.

16. Noting that the judges power on revision encompasses those under sections 354, 357 & 358, We are of the opinion that a party is not entitled to pursue an appeal and revision either concurrently or successively. One has to make an option.

17. In the present case, the Applicant sought pursued and was heard on an appeal and a determination

rendered. Having so opted, the provisions of section 364 criminal procedure code prohibit him for seeking review.

18. Additionally the fact that he has been heard on appeal and th said appeal dismissed only entitle him to seek an appeal or review before a higher court as prescribed by law Article 50(2) q provides:

***“Every accused person has a right to fair trial which include the right:-***

***(q) if convicted to appeal to or apply for review by, a higher court as prescribed by law.***

***The appellant was by dint of Article 164(3) entitle to an appeal to the Court of Appeal once this court made a determination on his appeal.”***

19. In Criminal Appeal No.61 of 2004 **MUYA -VS-REPUBLIC** cited in **REPUBLIC -VS- BAKRASH AKBHA ABDALLA [2005] EKLR**, the court said:

***“An order made by the High Court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction and accordingly in this case was appealable to the court of appeal.***

***It therefore follows that once a party is heard on appeal by the court, if such party cannot again be permitted to file and be heard on an application for review.”***

20. In totality, the application presented by the originating Notice of Motion filed in court on the 16/6/2014 is totally misconceived bad and barred in law and is ordered dismissed in its entirety.

**Dated, signed and delivered at Mombasa this 19th day of February 2016.**

**DORAH CHEPKWONY**

**P.J.O.OTIENO**

**JUDGE**

**JUDGE**

Delivered in the presence of Ms.Ochola and the petitioner.