



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 77 OF 2015

ALOISE ONYANGO ODHIAMBO PETITIONER

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Background

1. The petitioner was charged with the offence of robbery with violence in Criminal Case No. 5215 of 2003 at the Kibera Chief Magistrate's Court. After a full trial, he was found guilty of the offence and sentenced to death as prescribed in section 296(2) of the Penal Code. He appealed against his conviction and sentence to the High Court, but his appeal was unsuccessful. Thereafter he lodged a second appeal at the Court of Appeal which was similarly unsuccessful. He has now filed the present petition challenging the constitutionality of the trial he underwent, and has petitioned for a retrial under Article 50 (6) of the Constitution.

The Petitioner's Case

2. The petitioner sets out his case in his petition filed on 2nd March, 2015 and written submissions dated 9th June, 2015. He contends that he is dissatisfied by the decision arrived at by both the trial magistrate and appellate courts with regard to his conviction and sentence on both the charge sheet and committal warrants. As I understand it, his contention is that during the entire trial process, he was not accorded impartiality and fairness, particularly during his defence under section 211 of the Criminal Procedure Code. This is because the trial magistrate did not comply with the said section before the petitioner was required to give his defence. It is his contention that the trial court allowed him to be cross-examined by the prosecution, which he contends was irregular, defective and un-procedural, especially since he gave an unsworn statement in his defence.
3. It is his contention further that in its judgment, the trial court did not conform to the full requirement of the law pursuant to section 169 of the Criminal Procedure Code. He argues that the trial magistrate failed to make certain remarks in the judgment, namely the points for determination, the decision, and the reasons for the decision. It is his contention therefore that the trial court erred, and this therefore warrants a retrial.

4. In his oral submissions, the petitioner argued that there was no sentence in the judgment rendered by the trial magistrate, and neither did the magistrate sign and date the judgment as required under section 169 of the Criminal Procedure Code. It is his case that an impartial and fair trial was not accorded to him, and his conviction and sentence are unlawful. He therefore urges the Court to order a retrial as his rights under Article 50 (1), (2), and (6) (a) of the Constitution were infringed, and he should be accorded access to justice as required under Article 48 of the Constitution.

The Response

5. The State responded through the office of the Director of Public Prosecutions (DPP) and the Attorney General. The DPP filed a replying affidavit sworn on its behalf by Ms. Stellah Nyamweya on 9th June, 2015, Grounds of Opposition dated 17th July, 2015, and written submissions dated 16th July, 2015. Learned State Counsel, Ms. Kihara, presented the case for the DPP.
6. The DPP opposed the petition and prayed that it should be dismissed as it is frivolous, misconceived and an abuse of the court process. It was his case that the petition does not disclose any denial, violation, infringement or threat to the petitioner's fundamental rights and freedoms, and does not meet the threshold under Article 50 (6) of the Constitution. It is his case further that the orders sought cannot issue as the matters raised in the petition were properly determined by courts of competent jurisdiction at the appellate stage.
7. In her affidavit in opposition to the petition, Ms Nyamweya deposes that the petitioner was accorded a fair trial in compliance with Article 50 of the Constitution by the trial court and both appellate courts. She noted that the issues raised in this petition had been raised in the Court of Appeal but were dismissed for lacking in merit. In her view, the petitioner was forum shopping as Article 50 (6) of the Constitution contemplates situations in which new and compelling evidence has been availed before the High Court can consider ordering a retrial. In the present case, no such new and compelling evidence has been presented.
8. The DPP argued further that the petitioner had failed to appeal to the highest court in the land, which is the Supreme Court. In order to rely on Article 50 (6) of the Constitution, he must demonstrate that his appeal went to the highest court in the land and new and compelling evidence has become available. The DPP relied on the decision in **Ramadhan Juma Abdalla and Others vs Republic [2012]eKLR, Rose Kaiza vs Mpanju Kaiza [2009] eKLR and Mzee Wanje and Others vs A. K Sakwa and Others (1982-88) 1 KAR** to submit that the petitioner must avail new and compelling evidence for a retrial to be granted.
9. Through Learned State Counsel, Mr. Kamunya, the Attorney General associated himself with the submissions made on behalf of the DPP. He also agreed with the DPP that the petition is frivolous, misconceived and an abuse of the court process, did not disclose any denial, violation, infringement or threat to the petitioner's fundamental rights and freedoms, and did not meet the threshold for a new trial under Article 50 (6) of the Constitution. He prayed that the petition be dismissed.

Determination

10. The petitioner has brought his claim under Article 50(6) of the Constitution. He asks the Court to order a retrial on the basis that he was not accorded a fair trial at the trial as well as at the appellate stage in both the High Court and the Court of Appeal.
11. Article 50(6) of the Constitution provides as follows:

(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

(b) new and compelling evidence has become available.

12. I note from the petitioner’s pleadings that following his conviction and sentence by the trial court, he appealed to the High Court and the Court of Appeal. One of the grounds of appeal to the Court of Appeal was that ***“The Honourable Judges in the Superior Court erred in law and fact in not finding that the Judgment of the trial magistrate failed to comply with Section 169 (1) of the Criminal Procedure Code.”*** Upon considering this ground, which is at the core of the present petition, the Court of Appeal found as follows:

“[25] Upon consideration of the judgment of the first two concurrent courts as above, we find that in both judgments, the offences were stated together with their particulars. Then followed by a narration of a summary of the evidence tendered by both sides. Both judgments addressed themselves to the major issues for determination namely whether the appellant was involved in the commission of the offence with which he was charged...”

We are therefore satisfied that both concurrent courts clearly considered the evidence adduced by both sides before the learned trial magistrate found the appellant guilty, convicted him and sentenced him, on the one hand and the first appellant court dismissed the appellants appeal to it on the other hand. We have no quarrel with those findings...”

13. In the circumstances, I am satisfied that the question of whether the decision of the trial court was in accordance with section 169 of the Criminal Procedure Code was addressed by the Court of Appeal. This Court, which is bound by decisions of the Court of Appeal, cannot purport to sit on appeal under the guise of a constitutional petition, on a decision made by a court superior to it.

14. Has the petitioner met the test of Article 50(6)? As I have observed above, the petitioner’s complaint in this petition revolves around the provisions of section 169 of the Criminal Procedure Code, which he alleges had not been complied with. Nowhere in his pleadings does he attempt to show the existence of new and compelling evidence as required under Article 50(6)(b).

15. In this regard, in the case of **Patrick Macharia vs Republic, Misc Crim App No. 14 of 2013, the Court stated as follows.**

“...In order to invoke this court’s jurisdiction under Article 50(6) of the Constitution 2010, the petitioner must demonstrate that;

a. His prayers were dismissed by the highest court of appeal in the land.

b. That new and compelling evidence has become available and which was not available at the time of his trial.

c. Alternatively the petitioner should show that he did not appeal in which case he must in addition demonstrated was new and compelling evidence had become available.

d. Further the Petitioner’s case or appeal, whichever is applicable must have been concluded after the promulgation of the Constitution 2010.”

16. The court went on to observe that:

“...The procedure introduced under Article 50 (6) cannot be used to circumvent the due process of the law, or be used as a means of having a parallel appeal to the one prescribed under the Criminal Procedure Code. In regard to the new and compelling evidence, the question is whether the Petitioner has shown that the ‘new’ evidence was not available to him during the

trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals. The second test was for the Petitioner to show that the ‘new’ evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. The evidence must be shown not only to be favourable to the Petitioner but likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.”

17. In similar vein, the High Court in **Maurice Odhiambo Wesonga vs Republic, High Court Petition No. 4 of 2013** stated as follows:

“[6] A person who has been convicted and has exhausted all the appeals has the right, under Article 50(6) of the Constitution to seek a fresh trial by demonstrating that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court among them; Ramadhan Juma Abdalla and 3 Others vs R Nairobi Petition No. 468 of 2012[2013]eKLR, Wilson Thirimba Mwangi vs Director of Public Prosecutions, Nairobi Petition No. 271 of 2011, [2012]eKLR, Mohamed Abdurrahman Said and Another vs Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported). The authorities demonstrate that in order for a petition under Article 50(6) of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.” (Emphasis added)

18. Thus, the requirements of Article 50 (6) of the Constitution are clear. A petitioner seeking a retrial under the provision must demonstrate that his/her appeal has been dismissed by the highest court to which an appeal lies; or that no appeal was tendered within the time allowed for appeal, **and that new and compelling evidence** has become available.

19. As is evident from the analysis of the petitioner’s case above, his main grievance revolves around the conduct of his trial- that the trial court allowed his cross-examination even though he had given an unsworn statement in his defence- and compliance with section 169 of the Criminal Procedure Code. The petitioner raised these matters with the appellate courts, which considered the issue and rendered a decision, the effect of which was that no prejudice had been suffered by the petitioner at his trial, and his appeals were therefore unsuccessful. He has not presented before me any new or compelling evidence that was not available before, which would justify a retrial under Article 50(6).

20. This petition therefore is totally without merit, and it is hereby dismissed, but with no order as to costs.

Dated Delivered and Signed at Nairobi this 31st day of March 2016

MUMBI NGUGI

JUDGE

Mr. Aloise Onyango Adhiambo, petitioner in person.

Ms. Kihara instructed by the Director of Public Prosecutions and Mr. Kamunya instructed by the State Law Office for the State.