



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**HIGH COURT CRIMINAL MISC. APP. NO. 40 OF 2015**

**CLIFF BIKERI MOKUA.....APPLICANT**

**EDWIN CHWEYA MOKUA.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Introduction**

1. The applicants herein were arraigned before the Nyamira Chief Magistrate's court where they were charged, convicted and sentenced to life imprisonment for the offence of Robbery with Violence contrary to **section 296 (2) of the Penal Code**. They then lodged an appeal to the High Court being Kisii HCCRA No. 268 of 2011 which appeal was heard and determined by a two bench Judge presided over by Maina J, a judge of the High Court and Okong'o J, a judge of the Environment and Land Court; a court with the equal status as the High Court. The appeal was subsequently dismissed when the 2 judges upheld the lower court's decision. Dissatisfied with the judgment of the High Court, the applicants appealed to the Court of Appeal at Kisumu before Onyango Otieno, Azangalala & Ole Kantai JJA and on the 19<sup>th</sup> September 2014, the appeal was dismissed.

**The Application**

2. After the dismissal of their appeal by the Court of Appeal, the applicants filed this instant application under **Article 23 (1) and Article 50 (6) (a) and (b) of the Constitution** seeking the following orders:-

- (1) That the application to argue new and compelling grounds of appeal under Section 23 (1) and section 23 (1) and section 50 (6) (a) and (b) of the Constitution**
- (2) That their application raises points of law and fact for urgent hearing and determination.**

The above application is supported by the following grounds:-

- (a) That their appeal to the court of appeal was dismissed on 19<sup>th</sup> September, 2014.**
- (b) That the learned trial magistrate erred in law and fact by not providing them with facilities to prepare for defence as required by the law as per article 50 (2) (d) of the**

## **Constitution.**

**(c) That the learned trial magistrate erred in law and in facts by not informing them in advance of the evidence the prosecution intended to rely on and for us to have reasonable access to that evidence as accorded in article 50 (2) of the Constitution.**

**(d) That the learned trial magistrate erred in law by not complying with the provision of the section 329 criminal procedure code before handing them death sentence.**

3. When the above matter came before me on 19<sup>th</sup> October 2015 Mr. Onyancha learned counsel for the applicants submitted that this constitutional reference was only for mention pending a Supreme Court decision on the same.

4. On 15<sup>th</sup> December 2015 Karanja J. directed the application be heard and determined on the basis of the law as it currently stands. When the matter came up for hearing before me on 1<sup>st</sup> March 2016, parties agreed to file and exchange written submissions.

## **Determination**

5. I have perused the rival submissions and noted that the following points need to be highlighted before delving into the merits of the application.

**The judiciary held a service week between 14<sup>th</sup> and 18<sup>th</sup> October 2013 in which all judges of the High Court, Employment and Labour Relations Court and Environment and Land Court were engaged in hearing criminal appeals at 20 High Court Stations. Pursuant to Gazette Notice No. 13601 dated 14<sup>th</sup> October 2013 the Chief Justice designated Maina and Okongo JJ. to hear such criminal appeals in the High Court of Kenya at Kisii which appeals included Kisii HCCRA 268 of 2011 that has eventually given rise to the instant application.”**

**On 15<sup>th</sup> May 2015, the Court of Appeal sitting at Malindi in Jafferson Kalama Kengha & 2 Others V Republic (2015) eKLR, Okwengu, Makhandia and Sichale JJA ruled that all the proceedings before the High Court as presided over by Judges of the Environment and Land Court or the Employment and Labour Relations Court were a nullity for want of jurisdiction and ordered for the re-hearing of the appeals afresh. They therefore ordered that the proceedings before the High Court be quashed for being a nullity.**

6. **Articles 23(1) and 50(6) of the Constitution** under which this application has been filed provides as follows:

**23(1)" The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.**

**50(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.**

7. I note that **Article 50(6)** envisages that an applicant files a petition and not a miscellaneous application as the applicants have done in this case but nevertheless, this court shall be guided by Article 159 (2) (d) which stipulates that Justice shall be rendered without undue regard to procedural technicalities and proceed to determine the merits of the application.

8. This court has been called upon to determine the following issues:-

**(1) Whether the applicants were accorded a fair trial in the trial court in view of their allegation that they were not supplied with witness statements and that the trial magistrate declined to grant them an adjournment when they applied for it?**

**(2) Whether the hearing of their appeal in the High Court was a nullity in view of the ruling by the Court of Appeal at Malindi in the case of *Jafferson Kalama Kengha & 2 Others Vs Republic (2015) eKLR*.**

9. The meaning of the term "new evidence" was explained by the Supreme Court in the case of **Lt. Col. Tom Martins Kibisu –vs- Republic [2014] eKLR** when the Supreme Court Judges P. K Tunoi, M. K Ibrahim, J. B Ojwang, S. C Wanjala and N. S Ndungu agreed with the Court of Appeal by stating as follows:

**“Under Article 50 (6) “new evidence” means evidence which was not available at the time of trial and which despite exercise of due diligence could not have been availed at the trial” and “compelling evidence” implies evidence that would have been admissible at the trial, of high probative value and capable of belief which if adduced at the trial would probably have led to a different verdict”. A court considering whether evidence is new and compelling for a given case, must ascertain that it is prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against an accused person.”**

10. A reading of the above authority shows that the new and compelling evidence must relate to the criminal trial, must be such that it would not have been available to the petitioner, with the exercise of due diligence, at the time of the trial and would make a difference to the court’s finding with regard to an accused guilt or innocence.

11. The applicants' claim that they were not accorded a fair trial when the trial court declined to grant them an adjournment on 21<sup>st</sup> June 2012 and that were not supplied with prosecution witness' statements cannot, by any stretch of imagination, be considered to be new evidence since these were purely instances that took place during the trial and were already known to the applicants. This court holds the view that the issue of the alleged failure to grant the applicants a fair trial is not a ground for petition for a new trial as envisaged by **Article 50(6) of the Constitution** as this is an issue that ought to have been raised by the applicants during the hearing of their appeals before the High Court and the Court of Appeal

12. I now turn to the most crucial aspect in this application which touches on the jurisdiction of a judge of the Environment and Land Court to hear a criminal matter based on the Court of Appeal decision at Malindi delivered on 15<sup>th</sup> May 2015 in **Jefferson Kalama Kengha & 2 Others V Republic (2015) eKLR** (*hereinafter "the Malindi case"*), in which the court declared that proceedings in a criminal appeal heard by Environment and Land Court judges were a nullity for want of jurisdiction and consequently quashed the said proceedings and ordered that the appeal be heard afresh before a High Court manned by judges of competent jurisdiction.

13. In the instant case it is not disputed that one of the judges who heard the initial appeal before the High Court was Okon'go J, a judge in the Environment and Land Court following the aforementioned gazettelement by the Chief Justice. It is however noteworthy that the Court of Appeal sitting at Kisumu upheld the High Court's decision thereby precipitating the instant application. With this background in mind, it is not lost to me that the decision of Court of Appeal in the Malindi case is still the subject of a pending appeal before the Supreme Court. Be that as it may, this court does not have the jurisdiction to alter the decision of the Court of Appeal (at Kisumu) on the basis of the decision in the Malindi case because firstly: want of jurisdiction by an Appellate court is not one of the grounds for an order of a new trial as envisaged by **Article 50(6) of the Constitution**, secondly; both the Court of Appeals sitting at Kisumu and Malindi have concurrent jurisdiction in which case, the decision in the Malindi case cannot supersede or override the decision of the Court of Appeal sitting at Kisumu unless and until the Supreme

Court upholds the decision in the Malindi case. Lastly; the decision by the court of Appeal sitting at Kisumu was delivered on 14<sup>th</sup> September 2014 way before the decision in the Malindi case was made on 8th May, 2015.

14. In **Rodgers Ondiek Nyakundi & 2 Others v State [2012] eKLR Sitati J.** held;

**"It is now well settled that a Petition (or application in this case) under Article 50(6) is not a re-trial or an appeal, and that the court to which such petition or application is made has " no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal." The only duty this court has to fulfill is to see whether there is any new and compelling evidence to warrant an order for retrial. The applicant's desire in this case is that the case be heard afresh so that all the evidence is placed before the court, including specimen evidence though he does not specify what that evidence is. There is no doubt that the applicant had every opportunity to apply to adduce fresh evidence before or at the hearing of his appeal . He could also have made such an application to the Court of Appeal. The door was closed and this court has no power to re-open it."**

15. In the instant case, as I have already observed in this ruling, the applicants have not disclosed the new evidence that they now have in their possession so as to justify their application to be allowed to go for a new trial. In my humble view and as correctly submitted by the respondents counsel, **Article 50 (6) (a) and (b) of the Constitution** is limited to trials and not appeals. The issue of whether or not the High Court bench presided over by a judge of the Environment and Land Court had jurisdiction to hear and determine the appeal is in my view, not an issue that translates to new evidence but one that can only be determined by an appellate court of higher jurisdiction and not this court with concurrent jurisdiction to the court whose decision is under attack.

16. As matters stand currently, this court cannot sit on appeal in a matter that has already been determined by the Court of Appeal. I reiterate that the mandate of this court, in an application of this nature, is limited to the making of an order for a new trial where an appeal has been dismissed by the highest court and where there is new and compelling evidence that has become available.

17. The distinction between this case and the Malindi case is that the Malindi case, the appellants contested the jurisdiction of judges of the Environment and Land Court to hear and determine criminal appeals while in the instant case, the question of the High Court's jurisdiction was not raised. This court also takes judicial notice of the fact that there is already an appeal pending against the judgment of the Court of Appeal in the Malindi case before the Supreme Court. It therefore follows that the proper forum for the applicants to present their case is to similarly subject their concerns to the Supreme Court's jurisdiction for determination or await the decision of the Supreme Court on the issue, which is now still a grey area, before charting their next cause of action.

18. In sum, therefore, having found that this application does not meet the threshold set by **Article 50(6) of the Constitution** for the grant of orders for a new trial and having found that this court cannot sit on appeal on a decision made by a court of concurrent or higher jurisdiction, the order that commends itself to me is an order to dismiss the application dated 19th September 2014.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of July 2016.**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Onyancha for the Applicants
- Otieno for the Respondent
- Omwoyo court clerk