

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 23 OF 2015

JOHN MUTWIRI MBERIA PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

JUDGEMENT

The current petition was filed on the 9th September, 2015. The petitioner contends that he was not accorded a fair trial as enshrined in Article 50 (2) (c) and (k) of the 2010 Constitution as well as sections 34 (i) (b) and (d) and 163 of the Evidence Act, Cap 80 Laws of Kenya. The petitioner also states that two of his witnesses out of his four defence witnesses are now available and ready to testify. The petition is supported by the petitioner's affidavit. There are also two supporting affidavits sworn by Robert Juma Ngungu and Redemter Mwendu Mueni on 4th September, 2015.

The petitioner filed written submissions in support of his petition. He contends that his constitutional rights were violated. It is also submitted that he is a victim of mistaken identity by a single witness. He informed the court that he had witnesses to call but he was not allowed to call them. He was not also given the statements of the witnesses and this was a denial of access to information. He requested for the proceedings of the trial court before preparing for his defence but he was not given. The trial was not therefore fair and his constitutional rights were violated.

The state opposed the petition. Mr. Fedha, prosecution counsel, submit that the petitioner was properly convicted. All the issues being raised in the petition were dealt with by both the High Court and the court of appeal. There was no violation of the petitioner's constitutional rights. The petitioner knew his witnesses and he could have called them to testified.

I have gone through the background of the petition. The petitioner and two others were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The robbery occurred on the night of 26th and 27th April, 2004 at Bombolulu in Mombasa County. During the robbery the watchman and a doctor were killed. The offence took place at a private clinic. The petitioner was found guilty of the offence and sentenced to suffer death. The judgement of the trial court was delivered on 22nd February 2007.

The appellant and one of his co-accused filed criminal appeal number 32 of 2007 before the Mombasa High Court. The appeal was dismissed by a two judge bench on 29th November, 2011. The petitioner once again together with one of his co-accused filed criminal appeal number 178 of 2012 before the Court of Appeal. The appeal was dismissed on 6th November, 2014.

The appellant has raised the issue that he was not allowed to call his witnesses during the trial. The record of the trial court show that the prosecution closed its case on the 8th November, 2006. On 4th December, 2006 the trial court ruled that the petitioner and his co-accused had a case to answer. The petitioner informed the court that he would give sworn evidence and call four witnesses. He testified on the 18th January 2007 but never called any witnesses. He did not inform the court that he wanted to call the four witnesses. I have read the two affidavits of the two witnesses who are now ready to testify for

the petitioner. There is the affidavit of Robert Juma Ngungu. He states that he was the petitioner's landlord at Bombolulu. He is the owner of plot No. 645. He avers that there was a routine whereby he used to close the gate at 9.15 pm for security purposes and he would remain with the keys upto 6.00 am in the morning. The petitioner was in his house during the alledged date of the robbery. The other proposed witness is Redemter Mwende Mueni who is the petitioner's wife. She avers that on the night of 26th and 27th April, 2004 the petitioner was at home. The gate was closed at 9.15 pm and the petitioner did not go out that night.

While testifying before the trial court, the petitioner testified that he was at home on the night of 26th and 27th April, 2004. He told the court that he lives with his wife and the landlord. He further testified that at 10.00 pm the landlord closes the gate and remains with the key until 6.00 am the following day. It is therefore clear that even the alledged new evidence was part of the petitioner's evidence. The trial court observe that the landlord was not called to testify. In the judgement of the Court of Appeal paragraph 22 thereof deals with the petitioner's issue of calling his four witnesses. The Court of Appeal stated as follows: -

It therefore follows, that a duty lay upon the appellants to alert the court of the presence of their witnesses in court (if any), or to seek an adjournment to enable them call such witnesses, or to seek the court's assistance if necessary to secure the attendance of the witnesses. No such action was adopted. The appellants cannot therefore complain that their witnesses were denied an opportunity to be heard when they failed to exercise that right.

It is therefore established that the issue of calling witnesses was dealt with by the Court of Appeal. The Court of Appeal noted that the petitioner raised an alibi defence and still dismissed the appeal. Therefore, even if the two alledged witnesses were to testify, they will not add any value to the defence.

The petitioner contends that there was violation of Article 50 (2) (c) and (k) of the Constitution. The issue of fair trial and the right to adduce and challenge evidence was dealt with by the Court of Appeal. Paragraph 7 of the judgement of the Court of Appeal refers to one of the grounds of the appeal before the High Court as violation of constitutional rights to a fair hearing. I do find that the trial was fair and there was no violation of any constitutional rights. Reference has been made to section 34 of the Evidence Act. The section deals with admissibility of evidence given in previous proceedings. This issue was also dealt with by the Court of Appeal. The petitioner submitted that he wanted to make reference to Mombasa High Court Criminal Case No. 25 of 2004 during the trial. Paragraph 21 of the judgement of the Court of Appeal dealt with this issue and it was noted that both the trial court and the High Court dealt with the issue of that criminal case file. The Court of Appeal noted that the trial court observed that the production of that file was not relevant to the appellant's defence and declined the request to have the file produced. Section 163 of the Evidence Act deals with the issue of evidence that impeaches the credit of a witness. It is not relevant to the current application.

In the end, I do find that all the issues being raised by the current application were extensively dealt with by the trial magistrate, the two judge bench of the High Court and the three judge bench of the Court of Appeal. The petition is merely seeking to reintroduce the same issues back to the court. That cannot be allowed. There is no new and compelling evidence being introduced by the petition. It lacks merit and is hereby dismissed with no orders as to costs.

Dated and delivered in Malindi this 29th day of August, 2016.

S.J. CHITEMBWE

JUDGE