



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CONSTITUTIONAL PETITION NO. 4 OF 2012**

**PAUL KIPKORIR TANUI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. On 30<sup>th</sup> November 2010, the petitioner was convicted by the Kapsabet Magistrates Court for the offence of assault. He was sentenced to a fine of Kshs 15,500 or in default six months imprisonment. He did not prefer an appeal. The victim of the offence, Barnabas Kipkorir Kibenei, subsequently sued the petitioner for damages in civil suit number 274 of 2011 at Kapsabet Principal Magistrates Court.
2. The petitioner has now brought this petition claiming that the State violated his rights in the criminal trial. He claims that there was violation of rights guaranteed by section 77(2)(b),(d) and (e) of the repealed Constitution and Articles 49(1)(a) and 50(2)(e),(g),(j) and (k) of the Constitution of Kenya 2010. In a deposition sworn on 26<sup>th</sup> July 2012, the petitioner avers that he was arrested by PC Nzuka who failed to inform him of his right to remain silent; that he was not informed in advance of the evidence the prosecution intended to rely on; that he was not granted a full opportunity to challenge that evidence; and, that the trial court only allowed him to call three of his ten defence witnesses. The petitioner also claims that the trial was hurried; that he was prejudiced by lack of legal counsel; and, lastly, that the trial court did not inform him of his right of appeal.
3. The petitioner thus seeks a declaration that his rights to a fair trial were violated. He prays for a declaration that the criminal proceedings amounted to a mistrial. He craves that a new trial be ordered. He also prays for costs.
4. The petition is contested by the respondents. There is a replying affidavit sworn by Job Mulati on 3<sup>rd</sup> May 2013. Initially, the petitioner sought to cross-examine the deponent. However, the parties agreed that two offending paragraphs in the deposition be struck out. Paragraphs 3 and 8 were accordingly struck out. The remainder of the deposition can be summarized as follows: that the petitioner was well aware of his rights and consented to his trial; that the petitioner informed the trial court that he had three witnesses only; that after the close of the defence case, the petitioner was granted sufficient time to mount his defence; and, that there is no proper foundation for the declarations sought in the petition. In a synopsis, the case for the State is that it did not violate the rights of the petitioner. The state prays that the petition be dismissed.
5. On 22<sup>nd</sup> April 2014 learned counsel for the parties agreed that the petition be determined by written submissions. The petitioner's submissions are dated 6<sup>th</sup> October 2014; those of the

respondent are dated 17<sup>th</sup> November 2014. The petitioner had also filed a detailed list of authorities dated 17<sup>th</sup> May 2014. I have considered the petition, depositions, the authorities and rival submissions.

6. It is common ground that the offence occurred on 29<sup>th</sup> June 2010 when the petitioner assaulted Barnabas Kebenei. The petitioner contends that he was neither informed of the nature of offence or his right to remain silent. Section 77(2)(b) of the repealed Constitution provided that a person who is charged with a criminal offence be informed as soon as is practicable, in a language he understands and in detail, of the nature of the offence charged. That was the operative Constitution at the time of the trial. Article 49(1)(a) of the Constitution of Kenya 2010 provides that a suspect should be promptly informed of the reason for his arrest, the right to remain silent and the consequences for not remaining silent.
7. Section 77(2)(d) of the repealed Constitution provided that an accused person could defend himself *either* in person or through his counsel of choice. The petitioner was unrepresented. He was facing the charge of assault contrary to section 251 of the Penal Code. There was no *express* provision in the repealed Constitution requiring the court or the apprehending officer to inform the accused of his right to counsel. Article 50(2)(g) of the present Constitution is markedly different: it now requires the accused to be promptly informed of his right to counsel. Like I stated, when the petitioner's criminal trial commenced, the new Constitution had not been passed.
8. I am alive that a Constitution is not *necessarily subject to the same principles against retroactivity as ordinary legislation*. I am also guided by the Supreme Court that in order to re-engineer the social order, a constitution must *look forward and backward, vertically and horizontally*. See Samuel Kamau Macharia and another v Kenya Commercial Bank Nairobi, Supreme Court, Application 2 of 2011 [2012] eKLR. In interpreting the Constitution, the court must pay due regard to the language of the Constitution. I see nothing in the language of Article 50(2)(g) that makes it retroactive. By the time the Article came into force, the hearing of the petitioner's criminal trial had been concluded. The trial court was not obligated under the old Constitution to inform the petitioner, who was facing a charge of assault, of the right to counsel or to appoint one for him. Fundamentally, the petitioner neglected to appeal the judgment of the lower court. He forfeited a clear remedy provided by the law.
9. The decision cited by the petitioner in Rwamaro v Uganda [1986-89] 1 EA 492 (SCU) can be distinguished. In that case, the magistrates' court had denied the accused an adjournment. The accused had informed the court that his counsel was *absent*. An appeal to the High Court against the ensuing conviction was dismissed. The Supreme Court of Uganda held that failure to allow the adjournment amounted to a deprivation of the right to counsel through no fault of the accused. In the instant case, the petitioner never instructed legal counsel. The Constitution as it stood then provided that the accused could conduct the trial *either* in person or through legal counsel. On 28<sup>th</sup> July 2010, the petitioner informed the trial court that he was *ready* to proceed with his trial. It would thus be a misnomer to hold that the State or the trial court deprived him of the right to an attorney.
10. I have noted from the record that plea was taken on 1<sup>st</sup> July 2010. The petitioner was released on bail the same day. The trial commenced three weeks later on 28<sup>th</sup> July 2010 (I think the date on the typed record provided by the petitioner may be incorrect). On that date, and as I have stated, the petitioner informed the court that he was ready to proceed with the trial. The claim by the petitioner that he was denied the right to call seven more witnesses is not borne out by the record. At page 9 of the record, on 2<sup>nd</sup> May 2010 (again the date in the typed record may be inaccurate); the trial court explained to the petitioner his rights under section 211 of the Criminal Procedure Code. The petitioner informed the trial court that he had three witnesses. The defence case was adjourned to 27<sup>th</sup> May 2010 (the date in the typed record may be inaccurate). On the latter date, the petitioner and his three witnesses testified for the defence. At page 12 of the typed proceedings, the petitioner then informed the trial court that that marked the close of his case. There is simply no evidence that the petitioner intended to call more witnesses or that the court "restricted [him] to three witnesses" as he alleges. Granted those circumstances, the decision cited by the petitioner in Republic v Subordinate Court of the 1<sup>st</sup> Class magistrate City Hall and another ex parte Yougindar Pall [2006] 1 EA 330 (HCK) is not on point. I cannot say there was

- failure of equality before the law in this case. From the record, the petitioner cross-examined the State witnesses. Article 50(2)(k) of the Constitution entitles an accused to adduce and challenge evidence. In the instant case, I am unable to hold that there was any derogation from that principle.
11. The petitioner also alleges that the trial court failed to advise him of his right of appeal. I have again studied page 22 of the typed record of the lower court. On 30<sup>th</sup> November 2010, and after sentencing, the record reads: “*right of appeal within 14 days*”. The petitioner was present at his sentencing and had even tendered some mitigation. That ground of the petition is thus a red herring.
  12. I have also studied the record of the trial court on the date when the petitioner testified in his defence. He never raised the matter of his arrest; or, failure to be informed of the reasons for his arrest; or, failure to be notified of the nature of the proposed charges. When he cross-examined PW4 (the investigating officer) he never questioned the witness on *any* of those matters. He did not also make any application in the trial court for the arresting officer to be called to the stand.
  13. Article 50(2)(e) of the Constitution requires a trial to be concluded without delay. I am unable to hold in this case that there was *unreasonable* delay. The assault took place on 29<sup>th</sup> June 2010. Plea was taken on 1<sup>st</sup> July 2010. The trial was conducted in the month of July 2010. Judgment was delivered on 30<sup>th</sup> November 2010.
  14. The petitioner was entitled to a disclosure of evidence in the prosecutor’s hands. See section 77 of the repealed Constitution, *George Ngodhe Juma and 2 others v The Attorney General* Nairobi, High Court Miscellaneous Application 345 of 2001 (unreported), *Cholmondley v Republic* [2008] KLR 190. The record of the lower court does not indicate that the petitioner ever requested for witness statements or any other evidence from the State. The petitioner did not request nor was he denied access to any evidence in the hands of the prosecution. Article 50(2)(j) of the Constitution of Kenya 2010 is now wider and express: the accused is entitled to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to it. But it is not lost on me that this trial took place before the new Constitution. In both the *George Ngodhe Juma* and *Cholmondley* cases (supra) which were decided during the regime of the repealed Constitution, the accused and State respectively had made applications to access evidence held by the State or the accused respectively.
  15. The genesis of this petition would seem to be the civil suit for damages. That suit was filed way back in the year 2011. This petition was only brought on 24<sup>th</sup> September 2012. I thus agree with the respondent that this petition is a disguised appeal. It is clearly an afterthought to counter the civil suit. The primary matters urged in this petition are the true province of a criminal appeal.
  16. When I interrogate the entire petition, the petitioner’s motivation seems to re-open the criminal trial as a bulwark against the civil suit. In short, the petitioner did not alert the trial court of violation of section 77 of the old Constitution or the rights now found in article 49(1)(a) or 50 of the present Constitution. The petitioner slept on his rights; he failed to raise those matters for consideration by the trial court. The petitioner waited until long after his conviction to raise those matters. He paid the fine of Kshs 15,500 way back in the year 2010 and seemed content with the conviction and sentence. I say so because no appeal was preferred within the prescribed time.
  17. I am not satisfied that any of the petitioner’s fundamental rights to a fair criminal process were violated by the State or the trial court. The onus of proof fell squarely on the petitioner to show his rights were violated. Granted the evidence and the law, I cannot say that the petitioner has proved that the State violated his rights under section 77(2)(b),(d) and (e) of the repealed Constitution or Articles 49(1)(a) and 50(2)(e),(g),(j) and (k) of the Constitution of Kenya 2010. Like I pointed out, an important context is that the criminal trial of the petitioner was held well before the new Constitution took effect.
  18. Lastly, the plea for a new trial is on a legal quicksand. The petition is anchored on Article 50(6) of the Constitution of Kenya 2010. To succeed under that head, the petitioner is required to demonstrate two matters: that his *appeal* against conviction has been dismissed by the *highest court*; and, that *new and compelling evidence* has become available. Sadly, the petitioner has not met the threshold of either criterion. It follows as a corollary that the Court cannot issue any of the declarations or reliefs sought in the petition. The upshot is that the entire petition is devoid of merit. It is hereby dismissed. In the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 20<sup>th</sup> day of January 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

***Judgment read in open Court in the presence of:-***

Mr. C. Otieno for the petitioner instructed by C.F. Otieno & Company Advocates.

Mr. J. Mulati for the respondents instructed by the Office of the Director of Public Prosecutions.

Mr. J. Kemboi, Court clerk.