REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 97 OF 2011

JOHN KIPKEU KIPROTICH…….....PETITIONER

VERSUS

REPUBLIC……..…….....RESPONDENT

JUDGMENT

1. On 1st October 2004, the petitioner was convicted for the offence of robbery with violence by the Senior Principal Magistrate at Kitale. He was sentenced to suffer death. He preferred an appeal to the High Court at Kitale. On 25th October 2006, the appeal was dismissed. His final appeal to the Court of Appeal was dismissed on 24th April 2009. The petitioner has now presented an *amended petition* claiming that his rights to a fair trial were *violated*. He prays for an "*acquittal or any other remedy under Article 23 (3) of the Constitution"*.
2. The amended petition is predicated upon Articles 19, 20, 21, 22, 27 and 48 of the Constitution of Kenya 2010. The primary grounds can be condensed into six: first, that the petitioner's rights were violated because the identification parade was conducted in contravention of Articles 50 (4) and 27(1) and (2) of the Constitution as well as chapter 46 (iv) (c) and (d) of the *Force Standing Orders*; secondly, that there were shoddy investigations; thirdly, that his identification was not positive; fourthly, that the evidence of PW1 was contradictory and unreliable; fifthly, that the petitioner's rights to a fair trial and equality before the law were violated; and, sixthly, that by admitting the evidence of PW1, the petitioner did not get a fair trial as envisaged by Article 50(4) of the Constitution.
3. Those matters are buttressed by a deposition of the petitioner sworn on 15th May 2014. I will set out *in extenso* paragraphs 6 to 11 of the affidavit-

> *6. That I approach this court not to overturn the decision of the court of appeal but on constitutional view [sic].*
>
> *7. That the prosecution case was poorly investigated as police conducted identification parade yet PW1 and PW2 knows [sic] me as their neighbour.*
>
> *8. That though complainants knew me as their neighbour they did not lead to my arrest.*
>
> *9. That I was convicted on evidence of identification full of errors.*
>
> *10. That my rights in [the] Bill of Rights and Freedoms were violated and [I was] denied just and equal enjoyment of equality before the law.*

11. That I am entitled to acquittal likewise [sic] accused 1 who was acquitted during appeal."

4. The petitioner also relied on detailed hand-written submissions. The application is contested by the respondent. It is contended that the matters raised by the petitioner were conclusively settled by the two appellate courts. They include the issues of veracity of the evidence in the trial court, the question of identification, police parade and alleged violation of the petitioner's constitutional rights. I was also urged to find that there is no new or compelling evidence to warrant a fresh trial or the reliefs now sought by the petitioner. 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.

9. I have considered the *amended grounds* of the petition, the deposition and rival submissions. It is instructive that the petitioner at first presented a *notice of motion* dated 22nd September 2011 praying for a *new trial*. By his own admission, he could not marshal new and compelling evidence required by Article 50 (6) of the Constitution. He thus amended the petition to seek reliefs under Articles 22 and 23 of the Constitution. *Ipso facto* the petition cannot lie under article 50 (6) of the Constitution. The petitioner has failed to meet one criteria of the Article: to *prove* that he has obtained *new and compelling evidence*.

5. It is common ground that the petitioner was arrested on 20th July 2002 and charged with the offence of robbery with violence. He was convicted and sentenced to suffer death. The petitioner was tried by a competent court. The petitioner was aggrieved by the findings. His appeal to the High Court in Criminal Appeal 49 of 2005 was heard by two judges. It was dismissed on 25th October 2006. The Court of Appeal agreed with the concurrent findings of the two courts below. The petitioner has thus exhausted all his rights of appeal. He now wants to have a further bite at the cherry. Unfortunately, the petition is on a legal quicksand for the reasons I shall now enumerate.
6. The original trial and two appeals were concluded before the Constitution of Kenya 2010. I have already found that there is *no* new and compelling evidence to entitle the petitioner to a fresh trial. The question of his identification; whether the conduct of the identification parade was superfluous or dubious; and, the veracity of the testimony of PW1 or PW2 are all matters of evidence. They were considered by all the three courts. The new Constitution is not an avenue for a further or non-existent appeal. See *Mohamed Abdulrahman Said and another v Republic*, Mombasa, High Court Misc. Criminal Appl. 66A & 66B of 2011 [2012] eKLR, *Rodgers Ondiek Nyakundi v State* Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR.

10. The petitioner is asking this Court to reopen the matter, reconsider the findings of those courts, and grant some reliefs to the petitioner under Articles 22 and 23 of the present Constitution. A number of matters arise. The petitioner has exhausted all his rights of appeal known to the law. I have no jurisdiction to reconsider the appeals at the High Court and in the Court of Appeal. True, this Court has original jurisdiction and power to determine petitions claiming violation of rights or fundamental freedoms. That is not the real picture in this case: this entire petition is a *disguised* further *appeal* against his conviction and sentence.
11. An important question is whether the petitioner can benefit from the new Constitution of Kenya. As a general proposition, the Constitution is not retroactive unless it expressly states so. In *Wilson Thirimba Mwangi v DPP* [2012] eKLR, Majanja J dealt succinctly with the issue-

"The Constitution promulgated on 27th August, 2010 brought with it a new legal structure which was effective from that date. Article 263 provides that the Constitution shall take effect on the date of promulgation while Article 264 provides that on the date of promulgation, the former Constitution subject to the Sixth Schedule shall stand repealed.

"The effect of Articles 263 and 264 is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution. (See Joseph Ihugo Mwaura v Attorney General Nairobi Petition No. 498 of 2009 (unreported), John Githinji Wang'ondu and Others v Coffee Board of

Kenya and Another Nairobi Petition No. 255 of 2011 (unreported) and Du Plessis and Others v De Klerk and Another (CCT 8/95) [1996] ZACC 10).”

12. It is common ground that the petitioner’s criminal trial was conducted *before* the new Constitution took effect. The original judgment was delivered on 1st October 2004. The subsequent appeals to the High Court and the Court of Appeal were determined on 25th October 2006 and 24th April 2009 respectively *before* the new Constitution was promulgated. 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. In the unique circumstances of this case I am *unable* to hold that the articles of the Constitution cited in the petition apply *retroactively*.
13. As I have stated, there is no new and compelling evidence. The matters raised in this petition were dealt with conclusively by the three courts. I cannot on the basis of the deposition say the police investigations are suddenly shoddy; or that the identification of the petitioner was not positive. There have been conclusive findings by courts of competent jurisdiction. There is no clear basis for a finding that the petitioner was denied a fair trial; or that he was discriminated. The fact that his co-accused was acquitted on appeal does *not* mean the petitioner was *also* entitled to an acquittal. It was a matter of evidence and the considered judgment of the courts.
14. I am also unable to say that the petitioner in the circumstances was not afforded equal treatment and protection of the law. I have no reason to acquit him or to grant him any further relief. When I interrogate the entire petition, the petitioner’s motivation seems to be to re-open the criminal trial at all costs. The petition is a disguised but non-existent appeal couched in constitutional language. There must be an end to litigation.
15. The upshot is that the entire petition is devoid of merit. It is hereby dismissed. I make no orders on costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 12th day of March 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The petitioner (in person).

Ms. Karanja for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. J. Kemboi, Court clerk.