REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO. 2 OF 2014

IN THE MATTER OF ARTICLE 22, 23, 50(6) OF THE CONSTITUTION OF KENYA, 2010: SIXTH SCHEDULE, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS, PART 5, PROVISION 19 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 84(6) OF THE FORMER CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 50 OF THE CONSTITUTION OF KENYA 2010

ALBERT MAGU MUSA……. PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL …… RESPONDENT

JUDGMENT

1. The Constitutional Petition before this Court has been brought by ALBERT MAGU MUSA, the Petitioner, and is against the Attorney General of Kenya, the named respondent. In the petition, the petitioner is seeking a retrial or fresh trial of a criminal case that was preferred against him way back in 1991 vide Kerugoya Senior Resident Magistrate's Court Criminal Case No. 890 of 1991.
2. In the above criminal case, the petitioner was charged with three counts of offences relating to obtaining land registration by false pretense contrary to ***Section 320 of the Penal Code.*** The trial Court found him guilty in all the three counts and was convicted on 16th April 1993 and sentenced to serve two years in jail for Count I, 8 months for Count II and 10 months in Count III. The sentences were to run concurrently and the petitioner actually fully served his term fully in jail after his appeal vide NYERI HIGH COURT CRIMINAL APPEAL NO. 112 of 1993 was dismissed in a summary manner in accordance with ***Section 352(2) of the Criminal Procedure Code*** on 14th September, 1993.
3. The petitioner upon coming out of jail mounted a challenge on the dismissal of his appeal by filing an application in the Court of appeal vide Court of Appeal at Nyeri Criminal Application No. 1 of 2008 seeking extension of time to appeal against the decision of the superior Court to dismiss his

appeal on 16th May, 2008. The application was dismissed by the single judge who opined that the application lacked merit and an afterthought. The petitioner then referred his application to a full bench and the Court reached a similar verdict sealing his fate on 30th October 2009.

4. With the enactment of the new Constitution in August, 2010, the petitioner brought this petition on 12th April 2012 alleging that his trial was unfair and an infringement on his Constitutional rights.

PETITIONER'S CASE

5. The petitioner contends in his petition that he was denied a fair hearing at trial in the subordinate Court and that he was wrongfully convicted and sentenced to jail. He also opines that he never got a chance to ventilate his appeal which was dismissed summarily while he was serving his sentence.
6. The petitioner further contends that his appeal raised weighty points of law and never deserved to be dismissed in the manner it was. He blames his erstwhile advocates M/S Nyawira Gitonga & Co. Advocates for his failure to pursue his appeal on time. In his written submissions, the petitioner through his present advocates Wachira Ndungu & Co. submitted that when he was released from prison after serving his sentence in 2003, he tried locating his erstwhile advocates in vain forcing him to file a complaint with the then Advocates Complaints Commission which however proceeded to terminate the complaint on 30th August 2007.
7. The petitioner submits that he only came to know that his appeal had been summarily rejected on or about September 2007 when he went to Nyeri High Court to check on the status of his appeal. He says that he then embarked on looking for another lawyer which according to him proved difficult because none was willing to take up a matter that had been concluded long ago. He however says that he was able to get a lawyer in November 2007 who agreed to take up the matter and filed for extension of time at the Court of Appeal in 2008. His attempts however came to a naught when the Court of Appeal rejected the application to lodge his appeal out of time.
8. The petitioner submits that as a result of the Court of Appeal's decision, he was left without a remedy against his conviction and sentenced which he maintains were wrongful. He now seeks an order from this Court to be tried afresh to enable him establish his innocence and obtain compensation for the sentence he served in jail. His petition is brought under ***Article 50(6) of the Constitution*** and to support his petition, the petitioner relied on the supporting affidavit sworn on 5th April 2012 and a further supporting affidavit filed on 7th April 2015. The further affidavit filed in the Court file though lacks the jurat but, I will come to that later in this judgment.

RESPONDENT'S CASE

9. The Attorney General through Mr. F.O. Makori, the Litigating counsel, has strongly opposed the petition before Court through a replying affidavit sworn on 11th December 2014, a Notice of a Preliminary Objection dated 23rd February 2014 and written submissions filed on 14th April, 2015 in addition to a number of legal authorities cited which I will consider shortly.
10. The main gist of the respondent's objection to the petition is that the petition as presented is bad in law, misconceived and incompetent. The respondent contends that the orders sought as against him are untenable in law since the functions and duties of the respondent are well spelt out under ***Article 15b(4) (b) & (c) of the Constitution*** besides ***Section 5*** of the Office of the ***Attorney General's Act, 2012.***

    The respondents argues that he is the wrong party to be sued and the right person to be sued or who has the right mandate should have been the Director of Public Prosecution who is in charge of all public prosecutions in Kenya.

11. The Attorney General further contends that the petitioner has not come out clearly to pinpoint the exact infringement of his rights and has not given sufficient notice of any violation of his right to enable the State respond adequately. The respondent has cited authority of this Court in ***S.W.M VS 9 M.K. (2012) e K.L.R*** to persuade this Court. The Court held inter alia in that authority that it is an established principle that where a party alleges a breach of fundamental

rights and freedoms, he or she must state and identify the right infringed and how it is infringed in respect to him. The respondent has attacked the petition before this Court for lacking in specificity.

12. The respondent has also pointed out in their submissions that the petitioner has not disclosed any new and compelling evidence which has become available to him to warrant him to invoke the provisions of ***Article 50(6)(b) of the Constitution.*** The respondent contends therefore that the petitioner is not entitled to a fresh trial as envisaged under ***Article 50(b) of the Constitution***. The respondent opines that the petition is an abuse of Court process, lacks in merit and has no basis in law.
13. The Attorney General submits that the petition has failed to meet the threshold of the cited cases of ***ANARITA K. NJERU VS REPUBLIC (1979) K.L.R 154*** and ***TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS ATTORNEY GENERAL & OTHERS (Petition No. 229 of 2012)*** at Nairobi High Court and has asked this Court to strike out the petition with costs.

ISSUES FOR DETERMINATION

14. This Court has considered the petition filed, the supporting affidavit and the annextures and the submissions made. The rival submissions and the response by the Attorney General ably made by Mr. Makori on his behalf have also been considered. In my view, the following issues have come up in this petition for determination.

i. ***Whether the petitioner has properly invoked the provisions of Article 50(b) of Constitution to deserve a new fresh trial***
ii. ***Whether the petition as presented against the respondent is competent.***

15. (i) Whether the petitioner has properly invoked ***Article 50(b) of the Constitution*** and entitled to a retrial.

The law in ***Article 50(b) of the Constitution 2010*** provides as follows:-

"A person who is convicted of a criminal offence may petition 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.***

16. In light of the above provisions, this Court finds that before a person can institute a Constitutional petition under the above **Subsection (b**) he/she first must identify or establish an infringement of his/her rights under ***Article 50(1) – (5)*** of the Constitution. The provisions of ***Article 50 of the Constitution*** is extensive on the rights of an accused person to have a fair trial. The petitioner herein has been faulted by the respondent for not pointing out exactly any infringement of his rights to a fair trial. I have looked at the petition and the submissions made by the appellant and the only issue coming out is his predicament with his erstwhile advocate and the reasons for failure to appeal on time. But the basis or substance of the appeal itself which was critical is missing. In the absence of the same what remains is a petition that lacks specificity and a Court cannot grant a Constitutional right that has not been specifically pleaded. This is a position taken by a Court in the case of ***MATHEW OKWANDA VS MINISTER OF HEALTH & MEDICAL SERVICES & 3 OTHERS (NAIROBI PET NO. 94 OF 2012)*** where Hon. D.S MAJANJA J. observed as follows:-

> "***In the absence of a focused dispute for resolution by the Court, the Court was reluctant to express itself by the petitioner unless there was sufficient material that there had been a violation of the Constitution----"***

17. The respondent on this point has quoted the authority in the case of **JOHN KIMANI VS TOWN CLERK KANGEMA (NAIROBI) PET NO. 1030 OF 2007** ***unreported)*** which was referred

by Justice Majanja in the reported cited case of ***SWN VS GMK (2012) e K.L.R*** where the Court made the following relevant observations:-

> "***Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of rights they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is two fold. First the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution in a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights (sic). It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the Constitution that has been abridged"***

I do find that the petition before me is unclear about the Constitutional violation that the petitioner suffered for which he is now seeking a Constitutional remedy provided under ***Article 50(6).***

18. It is also important to note that for a person to properly and successfully invoke the provisions of ***Article 50(b)*** of the Constitution, he has to establish and prove that ***"new and compelling evidence has become available"*** as envisaged under ***Article 50(6)(b).*** The Constitution under ***Article 50(6)(b)*** therefore provides a qualification for enjoyment of the right to a new trial. The next issue or question is what constitutes ***"new evidence***" as envisaged by the Constitution. The Supreme Court in the case of ***TOM MARTINS KIBISU VS REPUBLIC (2014) e K.L.R*** made the following observation which this Court finds useful and relevant in this petition. The Court observed as follows:-

> ***"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"***

19. The same Court also went ahead to give its opinion on what ***"compelling evidence***" constitutes and stated as follows:-

> "***Evidence that would have been admissible at the trial, of high probative value and capable of belief, and 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"***

The petition before this Court is silent on the question of new and compelling evidence he may have discovered. I however find that the petitioner made a belated attempt to comply with the provisions by filing of a further affidavit which attempt however was in vain for 2 reasons.

20. (a) In the first place, the petition itself does not specifically plead discovery of new and compelling evidence to warrant a new trial so as to adduce the new and compelling evidence pursuant to the aforesaid Constitutional provisions.
21. (b) Secondly, the petitioner's further supporting affidavit though filed with the leave of this Court is really not an affidavit as the same clearly offends ***Section 5 of Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya)*** which states as follows:-

> ***"Every commissioner for oaths before whom any oath or affidavit is taken or made under this act shall state truly on the jurat or attestation at what place and on what date the oath is taken or made"***

The supporting affidavit on record does not have the jurat and it is not clear if the same was

inadvertently left out during filing or it was missing completely. Whatever the case the documents attached to the same are inadmissible in view of clearly statutory provisions under ***Section 35(4) of the Evidence Act***. From the foregoing, it is clear that the petition was really misconceived because the lack of discovery of new and compelling evidence renders the petition incompetent.

22. It is also important to note as an accused person or a convict for that matter can only invoke the provisions of ***Article 50(6***) on discovery of new and important facts unknown to him at the time of trial. This principle is derived from the common law doctrine of "***error of coram nobis "*** which underpins the provisions of ***Article 50(6) of Constitution*** of Kenya 2010. The historical basis of the same allowed the kings Bench to issue a writ of error directed to a Court of law for review of its judgment and it predicated on alleged errors of fact. It is clearer to the petitioner from the above background that his petition does not even come close to meeting the threshold as set by the law and the doctrine illustrated above.
23. The petition herein has been filed after more than a decade with the main reason not being for a discovery of new and compelling evidence but on the fact that the appeal against conviction could not be lodged on time. The reasons for delay to file the appeal were well canvassed at the Court of appeal both before a single Judge and a full bench. This Court notes that the cause for the delay was exhaustively dealt with and this Court cannot be called upon to make a finding over the same. The petitioner's delay was found to be inordinate and that was the end of the matter. The provisions of ***Article 50(6)*** cannot aid an obviously indolent party such as the petitioner herein. This Court noted from the record of proceedings of the subordinate Court that convicted the petitioner that he was an habitual offender who had been convicted previously for similar offences a fact that was clearly admitted by the petitioner prior to being sentenced to 2 years imprisonment on 16th April 1993.

(ii) Whether the petition as presented against the respondent is competent.

The respondent attacked the petition before Court and even filed a Notice of Preliminary Objection against the petition herein for seeking orders against a wrong party. It is true that the function and the mandate of the named respondent herein is illustrated under ***Section 156 4(d)*** and it is clear that criminal matters are outside the mandate given to the respondent herein. A look at ***Article 157 (6)*** shows that the mandate to deal with criminal proceedings is given to the office of Director of Public Prosecution and the petition herein though Constitutional in nature really relates to criminal proceedings and the right to a new trial. To that extent, the petition herein is incompetent for seeking to enforce order contrary to clear Constitutional provisions. The orders sought can only be enforced against the Director of Public Prosecution who is not a party to this petition.

In light of the above discourse, it is clear that the petition herein has failed the test of law. It must fail as it is defective and devoid of merit as illustrated but since it can only suffer one fate, it is hereby dismissed with costs.

R.K. LIMO

JUDGE

18/5/2015

18/5/2015

Before

Hon. Justice R.K. Limo

CC – Willy

Albert Musa present

Mwangi holding brief for Makori

Litigating counsel

Abubakar for Plaintiff

COURT: Judgment signed, dated and delivered in the presence of Magee for Plaintiff and Mwangi holding brief for Makori for the Attorney General.

R.K. LIMO

JUDGE

18/5/2015