REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION (CRIMINAL) CASE NO. 1 OF 2014

CLIFFORD OTIATO …..... PETITIONER/APPLICANT

VERSUS

REPUBLIC …..RESPONDENT

JUDGMENT

In his written petition dated 26th April 2012 but received in this Court on 21st January 2014 the Petitioner prays for a new trial Under Article 23(i) and 50 (6)(a) and (b) of the Constitution. He takes issue with the legality of the death sentence imposed on him in Maseno SRMCR. No. 961 of 2006 which sentence was confirmed by the High Court in Kisumu HCCRA No. 142 of 2008 and by the Court of Appeal in Kisumu CR/Appeal No. 181 of 2010. He contends that the omission to cite Section 295 of the Penal Code rendered the charge fatally defective hence the sentence should be set aside and a retrial ordered. He relies on the following cases:-

1. **Isaiah Kimathi V. Republic [2001] EKLR**
2. **Julius Kamau Mbugua V. Republic (unreported)**
3. **Protus Buliba Shikuku V. Republic (unreported)**

However at the hearing of the petition he appears to have abandoned the aforestated ground and in its place introduced grounds that he seeks a new trial as the judgment of the Court of Appeal was not read to him by the Judges but by the Deputy Registrar of the High Court and further that some of those judges were declared unsuitable.

Miss Muriu Learned Counsel for the state vehemently opposed the petition.She submitted that the Petitioner has not demonstrated that he has new and compelling evidence which was not within his knowledge at the trial. Secondly that even were the judgment of the Court of Appeal to have been read by the Deputy Registrar that would not be fatal and would not entitle him to a retrial and further that for the fact that the two judges were removed by the vetting board hold any water the fact that they were biased ought to have been proved through tangible evidence.

As for the omission to cite section 295 of the Penal Code it was her submission that had that been done the charge would have been defective. To support her submission she relied on the decision of the Court of Appeal which reiterated the position in **Joseph Njuguna Mwaura V. Republic [2013) eKLR, Simon Materu Munialu V. Republic [2007] eKLR** and **Joseph Onyango Owuor & Cliff Ochieng Oduor V. Republic [2010] eKLR.** On the issues of identification and injuries raised in the Notice of Motion it was her submission that those were dealt with by the Court of Appeal. She urged this Court to dismiss the petition.

Section 50(6)

The Constitution of Kenya 2010 introduced a new remedy for persons convicted of a criminal offence. To succeed however the Petitioner must demonstrate that his appeal has been dismissed by the highest Court to which he is entitled to appeal or that he did not appeal within the time allowed for appeal; and that new and compelling evidence has become available. The use of the word and before the second condition means that new and compelling evidence must be proved to exist. In **Tom Martins Kibisu V. Republic [2014] eKLR** the Supreme Court defined new and compelling evidence as follows:-

''…..... ''new evidence'' means evidence which was not available at the time and which, despite exercise of due diligence, could not have been availed at trial and ''compelling evidence'' implies ''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 …....''

Going by this definition there is no new and compelling evidence that would entitle the instant Petitioner to a new trial. Indeed his grouse is with the legality of the sentence imposed on him. In our view that seems to be a new ground for appeal but not new and compelling evidence as is envisaged under Article 50(6) of the Constitution. However it was not raised in any of the superior Courts and it cannot be raised now. As we stated in H.C. Kisumu Petition NO. 14 of 2012 **Timothy Karuibu Ngugi V. Republic:-**

''It ought to be remembered that this is a Constitutional Court and not an appellate Court. It cannot therefore cloth itself in an appellate garb and decide issues that were or ought to have been dealt with during trial or on appeal. To do so would amount to allowing the Petitioner two parallel and collateral remedies with respect to the same matter namely, a direct appeal and an application under Article 50(6), which would lead to conflicting decisions …...''

Be that as it may even if it could be raised that issue has already been determined by the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others V. Republic [2013] eKLR** where referring to **Simon Materu Munialu V. Republic [2007] eKLR** and **Joseph Onyango Owuor & Cliff Ochieng Oduor V. Republic [2010] eKLR** both of which dealth with the same issue stated:-

''…..... Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor V. Republic (Supra) the standard form of a charge, contained in the second schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one of provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the

offence of robbery with violence ought to be charged under section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person. The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplicate charge.''

Miss Muriu, Prosecution counsel therefore properly stated the law on that issue.

As regards the issue of identification and injuries alleged to have been sustained by the Petitioner those were dealt with by the Court of Appeal and nothing new has been shown to arise therefrom.

As for the allegation that the Court of Appeal decision was read by the Deputy Registrar that is not borne by evidence. Although the copy availed to this Court by the Petitioner is not certified it clearly shows that judgment was dated and delivered at Kisumu on 26th April 2012 by the three Judges who heard the appeal.

On the removal of some of those judges by the vetting board our view is that that is an issue for a higher Court but not this Court.

Accordingly we find that this Petition lacks merit and we dismiss it.

Signed, dated and delivered at Kisumu this 30th day of September 2015

H. K. CHEMITEI **E. N. MAINA**

JUDGE **JUDGE**

In presence of

for the state

for Petitioner

CC: Moses Okumu