



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 7 OF 2014

JOSENTA SYLVESTER KARANJAPETITIONER

VERSUS

REPUBLIC RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 22nd July, 2015 filed in court on even date. In the application, the petitioner (applicant) *Josenta Sylvester* urges the court to order that the Occurrence Book (O.B) of 3rd January, 2001 be availed to the court as he requires to use the information contained therein to prosecute his petition dated 17th November, 2014. It is clear from this prayer that what the applicant is seeking is not production of the whole O.B from Kitale Police Station but rather its extract containing entries made on 3rd January 2001.

2. A perusal of the petition reveals that the applicant is in the main seeking a retrial under **Article 50(6)** of the **Constitution** but he is also alleging that his fundamental rights were violated in the course of his trial as he was not accorded a fair trial which he alleges was a violation of **Article 50 (4)** of the **Constitution**. The petition is still pending hearing.

3. It is the applicant's case that he needs the OB of 3rd January, 2001 to be produced in order to effectively prosecute his petition.

The application is opposed by the state. Learned prosecuting counsel *Miss Karanja* submitted that the applicant has not demonstrated how production of the OB extract will assist him in his petition; that the information contained therein cannot be used to overturn his conviction; that the O.B extract is not new and compelling evidence which he did not have at the time of his trial and that the application is an afterthought. She urged the court to reject the application.

4. In his response to the state's submissions, the applicant contended that he needed the OB extract to show that he had been denied his fundamental rights guaranteed under the constitution from the date he was arrested to date and that since the state was not saying that the OB extract is not available, the same should be availed to him since it will form an important part of the evidence he intends to use in support of his petition.

5. I have carefully considered the application and the submissions made by the applicant and the learned prosecuting counsel. The applicant has maintained that he needs the information in the O.B extract in order to canvass his pending petition.

The state's submissions appeared to be largely targeted at the petition itself because it is only at the

hearing of the petition that the court would be required to consider whether the said O.B extract if produced amounted to new and compelling evidence in order to warrant a retrial under **Article 50(6) (b)** of the **Constitution**. We are now at the preliminary stages of the petition and that issue does not arise for determination at this stage. It is important to note that the state did not say in its response that the said OB is not available. Assuming the O.B is available and the court dismissed the application, this would in effect deny the applicant an opportunity to rely on evidence which in his view is relevant and important in the prosecution of his petition. This would fly in the face of the concept of fair hearing enshrined in **Article 50(1)** of the **Constitution**.

6. In any event, **Article 35(1)** of the **Constitution** grants to every person a right to information either held by the state or any person. **Article 35 (1)** states as follows:-

1. **Every citizen has the right of access to -**

a. **Information held by the state; and**

b. **Information held by another person and required for the exercise or protection of any right or fundamental freedom.**

It is not disputed that the O.B extract sought to be produced is expected to be held at the Kitale police station and by extension the state. The petitioner therefore has a right of access to the information contained in the said O.B. Whether the information is relevant or will be useful to the applicant in the prosecution of his pending petition is a different matter altogether and is not an issue for consideration by the court at this stage. I cannot make findings or comments at this juncture regarding whether or not the O.B in question would constitute new and compelling evidence since doing so will be like prejudging the merits or otherwise of the pending petition.

7. In the interest of justice and in order for the court not to appear as if it is blocking the applicant from accessing material which he believes is essential for the advancement of his petition and in order to accord the applicant a fair hearing in his petition, I am inclined to allow the application. I have however noted that the O.B entry is dated 3rd January, 2001 and we are now in October, 2015. Approximately 14 years have now passed and though the state did not deny or confirm the O.B's availability, in view of the long time lapse, I take the view that there may be a possibility that the said O.B is no longer available. In the circumstances, in order to ensure that the court does not issue orders in vain, i will allow the application on terms that a certified copy of the O.B extract of 3rd January, 2001 held at Kitale police station be availed to the court by the O.C.S of Kitale police station or his representative either on the hearing date of the petition or such other date as may be ordered by the court if it is available and can be produced within a reasonable time.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of October, 2015

In the presence of:-

The Petitioner

Mr. Lesinge