REPUBLIC OF KENYA
KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO 140 OF 2012

KIMTAI CHEBET::APPLICANT

VERSUS

REPUBLIC::RESPONDENT

RULING

KIMTAI CHEBET has invoked the provisions of Article 50(6) (b) of the Constitution. He was asking this court to order for his retrial.

He says that he was convicted on four (4) counts of Robbery with violence contrary to Section 296(2) of the Penal Code; one count of Handling stolen goods; and one count of being in possession of a firearm without a valid firearm certificate.

He informed the court that he was sentenced to suffer death for the offences of Robbery with Violence.

For the offence of Handling Stolen Goods, he was jailed for one year. And for having a firearm without a valid firearm certificate, he was jailed for 12 years.

According to the applicant, he was dissatisfied with the judgement of the trial court, and he therefore lodged an appeal at the High Court. However, the High Court is said to have dismissed his appeal. That development prompted the Applicant to appeal to the Court of Appeal.

When the court inquired from the Applicant about the fate of the appeal which he had filed at the Court of Appeal, he said that the said appeal was still pending.

He complained to this court that the Court of Appeal had never called him to go and prosecute his appeal.

The Applicant also said that the record of the proceedings before the High Court had not been traced.

As a consequence, even this Application was heard without the benefit of the proceedings from both the High Court and the Court of Appeal.

It was the applicant's contention that unless a retrial was ordered by this court, he would continue to suffer in prison custody, because his appeal could not be prosecuted in the absence of the proceedings from the court that he was appealing from.

In response to the application, Mr. Omwega submitted that the applicant had invoked the provisions of Article 50 of the Constitution, in error. His reason for that submission was that Article 50 of the Constitution was only available to a person who had already exhausted the process of appeal.

Secondly, the Respondent submitted that the Applicant had failed to demonstrate any new or compelling evidence which he could not have been aware of during the time of the trial, if he had exercised due diligence.

As far as the Respondent was concerned, the delay in taking the Applicant to court, was not anything new.

The applicant countered that argument by saying that the High Court had actually held that he had been subjected to duress and torture.

As a result of the said duress and torture, the Applicant says that he had been unable to explain himself during the trial.

At the same time, the Applicant submitted that the High Court failed to give consideration to the submissions which he made before that court, during his appeal.

Of course, if the High Court had failed to give due consideration to the submissions made by the Applicant, that could have been a good basis for appealing against the decision of the High Court.

It is then that the applicant told the court that he had, indeed, filed an appeal, before the Court of Appeal.

Considering that he had already been in custody for over eleven years, the Applicant was of the view that Justice could only be attained if she was taken through a retrial.

Another factor which I was asked to consider was that the Applicant was already in custody, as at the date when he allegedly committed the offences in respect to which he was convicted. In effect, I understand the Applicant to xo be saying that he could not have been in a position to commit the offences in issue, because he was already behind bars when the said offences were being committed.

Finally, the Applicant complained that his trial was unduly rushed, so that he was denied sufficient time to make a proper decision on how best to defend himself. Pursuant to Article 50(6) of the Constitution of Kenya;

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

In this case the Applicant told the court that his appeal was still pending before the Court of Appeal. If that is the position, and I have no reason to doubt it because it is the Applicant who best understands the factual status of his case; then the provisions of Article 50(6)(a) of the Constitution cannot assist the Applicant. He would have to wait until his appeal was dismissed by the Court of Appeal.

But that may never happen because the record of the proceedings from the High Court are said to be missing.

Much as I appreciate the anxiety of the Applicant, due to the absence of the proceedings, I am afraid that that fact cannot be the basis for circumventing the express provisions of the Constitution.

The issues which the Applicant has raised, to try and persuade this court about the need for a retrial, do not constitute new and compelling evidence.

If the Applicant had been subjected to duress and torture, that would have been a fact which he was aware of when it happened. He cannot be heard to say that it was only much later that he learnt of the duress

and torture which was meted out against him.

And if the High Court did not consider the Applicant's submissions, he became aware of that fact when the court was delivering it judgement. The Applicant has therefore not placed any new and compelling evidence of that omission, if it was there.

The complaint about the speed with which the trial court handled the matter ought to be the basis for commendation, not condemnation.

If the record of the proceedings before the High Court were unavailable, that means that the record from the trial court were also missing. I say so because the High Court could only have heard and determined the appeal before it, if the record of the proceedings from the trial court were before it.

In the circumstances, it would imply that if a retrial was ordered, the same could not proceed, because the exhibits would not be available. Exhibits are ordinarily kept with the court file from the trial court.

The applicant says that the OB dated 5th August 2001 would show that by the date when the offences were committed, he was already in police custody, at the Iten Police Station. That assertion is also said to be verifiable from the OB from Kapsowar Police Station, for the 6th and the 16th of August, 2001 respectively.

To my mind, the entries in those Occurrence Books cannot be deemed new and compelling evidence. The Applicant was always well aware of the period of time when he was in custody. That is nothing knew to him. And if he had exercised due diligence, he should easily have obtained the requisite OB entries either during his trial or even when he lodged his appeal to the High Court.

Article 50 (6) of the Constitution was not intended to benefit persons who may not have had the wisdom or knowledge that could have enabled them to defend themselves better at the time of trial.

It is appreciated that many people would improve their conduct, if given the benefit of hindsight. But the learning which comes through either the experience of the trial or through the re-evaluation of the trial processes, cannot be the basis for an order of re-trial.

In this case, I find no merits in the application. It is therefore rejected.

DATED SIGNED AND DELIVERED AT ELDORET

THIS 29TH DAY OF APRIL, 2014

_____

FRED A. OCHIENG

JUDGE