REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 78 OF 2011

BENARD OCHIENG ODUOR:: APPLICANT

VERSUS

REPUBLIC:::RESPONDENT

RULING

The applicant, BENARD OCHIENG ODUOR, was convicted on three (3) counts of Robbery with violence, contrary to Section 296(2) of the Penal Code.

The prosecution case was that the applicant was one of the members of a gang that beat up and also robbed three families at Maili Tatu area, within Trans Nzoia District.

The applicant was sentenced to suffer death as by law prescribed. Being dissatisfied with the conviction and the sentence, he lodged an appeal to the High Court. The said appeal was dismissed.

Thereafter, the applicant lodged a further appeal; this time to the Court of Appeal. The said Court held that the Identification Parade in relation to the applicant was properly conducted.

This is what the Court said;

"We think in all the circumstances that the proper identification of the three appellants was correctly upheld by those courts. At any rate, even if we were to entertain reasonable doubts in respect to that evidence, the matter does not rest there. The conviction of the appellants did not rest wholly or substantially on the evidence of identification but on the evidence that soon after the robberies, the stolen goods were found in possession of the appellants and there was no explanation put forward by the appellants to displace the presumption in law, that they were either the thieves or the handlers."

The Court of Appeal delivered its Judgement on 24th February, 2006.

Thereafter the people of Kenya promulgated a new Constitution on 27th August, 2010. Prior to that new Constitution, the determination by the Court of Appeal would have concluded the case. However, the new Constitution introduced a window of opportunity for the applicant.

Article 50(b) of the new Constitution provides as follows;

"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, as the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available."

Pursuant to the provision, the applicant has now come before the High Court, seeking a retrial.

When canvassing the application, the applicant submitted that the evidence that was adduced before the trial court was not sufficient to warrant any conviction. Therefore, as he is a Kenyan, Oduor believes he has a right to seek a retrial.

In an endeavour to get an order for a retrial, the applicant, (Oduor), submitted that the trial court had not treated him fairly. His reason for so saying was that he had been denied his rights under the old Constitution.

When responding to the application, Ms. Ruto, learned state counsel, submitted that the applicant was not entitled to a retrial because he had failed to show any new and compelling evidence.

In the light of that submission, Oduor submitted that there was no evidence to prove that the exhibit belonged to the complainant. In his view, there ought to have been evidence from other persons who could be deemed as independent witnesses.

The applicant was not specific about the particular rights which the old Constitution denied him. He also did not specify any particular legal right which the old Constitution had accorded him, but which the trial court had deprived him of.

In any event, if there had been a right in the old Constitution, which the trial court had deprived the applicant of, that could not constitute new and compelling evidence, as set out in Article 50(6) (b) of the new Constitution.

The failure of the Investigating Officer to testify at the trial and the alleged failure by the complainant to prove his ownership of the exhibits were issues which should have become apparent at the trial. Therefore, the applicant should have able to raise the same either during the trial or when he lodged his respective appeals. If he did not do so, he cannot now seek to raise the said issues at a retrial. That would not be a proper use of the right conferred by Article 50 of the Constitution.

The other issue which the applicant indicated that he would wish to raise at a retrial, was in relation to the absence of **"independent witnesses."** I have noted that that issue appears to have been addressed by the Court of Appeal. This is what the court said;

"We also reject the invitation made to us by Mr. Omboto for the 2nd Appellant to make the finding that police witnesses are generally not reliable and therefore the sole evidence of PC Kibagendi on the recovery of the stolen items required corroboration. We find neither the requirement of corroboration in law nor the basis in fact for condemning police officers as generally unreliable. The veracity of the evidence of any witness must, in each case, be weighted on its own merits, and for our part we have no basis for faulting the two lower courts below who believed PC Kibagendi."

But even if it had been the position in law, that an **"independent witness"** had to testify before a court of law could convict an accused, the failure to ensure that that had happened would have been something which had taken place. It would be a fact of history; not a piece of new and compelling evidence.

In the final analysis, I find that the applicant has failed to discharge his obligation, to warrant a retrial. He has not demonstrated any new and compelling evidence which he only became aware of after his trial.

Accordingly, the application has no merits. It is therefore dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 9TH DAY OF APRIL, 2014

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FRED A. OCHIENG

JUDGE