



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 380 OF 2013

BETWEEN

AGGREY CHITERI PETITIONER

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC

PROSECUTIONS 2ND RESPONDENT

JUDGMENT

1. The petitioner's case is that the hearing of *Nairobi Court of Appeal Criminal Appeal No. 363 of 2006 (Aggrey Chiteri v Republic)* violated his right to a fair hearing.
2. The facts leading to this case are not in dispute. The petitioner was charged with five other persons with one count of robbery with violence contrary to **section 296(2)** of the *Penal Code* and being in possession of firearms and ammunition contrary to **section 4(2)** of the *Firearms Act*. He was convicted on both counts and was sentenced to death. He appealed his conviction and sentence to the High Court. The High Court (Lesiit and Makhandia JJ) confirmed the conviction. He thereafter appealed to the Court of Appeal which dismissed the appeal on 23rd April 2010 and affirmed the death sentence.
3. The petitioner's case in the petition is that before determination of the appeal, he received correspondence from the court registry stating that some of his appeal records were missing or had been tampered with and that a search for the original ones had proved fruitless. He contends that the Court of Appeal used and or relied on a non-existent charge sheet to affirm his conviction.
4. In order to demonstrate that the records were tampered with the petitioner referred to a letter dated 21st October 2008 from T.W.C. Wamae, Principal Deputy Registrar addressed to the Deputy Registrar of the Court of Appeal on the following terms; "*I hereby forward record of appeal for the above quoted appeal after re-certification for your necessary action. Since the charge sheet and Lower Court Judgment in the previous record had been tampered with, these records of appeal have been compiled from a record marked A which had initially been served on the Attorney General and it is also hereby forwarded. Our efforts to trace the original charge sheet and judgment of the Lower Court have been fruitless.*" The petition contends that this letter confirms the record was tampered with and that certain critical documents were said to be

missing.

5. The petitioner also refers to another letter dated 2nd October 2007 from the Senior Deputy Registrar of the High Court to the Deputy Registrar Court of Appeal. The letter is a forwarding letter for four records of appeal and appeal files containing the judges' notes. It also contains the original record of proceedings for **Criminal Case No. 7201 of 1996** and not the correct **Criminal Case No. 1453 of 2003** as reflected in the reference. The petitioner relies on another letter from the Attorney General's Chambers dated 6th May 2008 addressed to the Deputy Registrar, High Court which refers to **Criminal Appeal No. 363 of 2006**. The letter stated, "*Enclosed herewith please find the above stated files for rectification of record. The particulars in the Charge Sheets in the two files are different and also Judgment of the Lower Court.*"
6. Annexed to the petitioner's supplementary affidavit is an order dated 19th May 2006 which shows that **Criminal Appeal No. 363 of 2006** was adjourned as follows, "*Mr Marube, learned counsel for the Appellant, wants to be given time to study two or so versions of the record. We grant an adjournment as prayed and Mr Marube must study the whole record whether in one, two or three versions and must be prepared to argue the appeal when it next comes up. The appeal is adjourned to a date to be re-fixed.*"
7. Mr Wagara, counsel for the petitioner, submitted that all the correspondence and order referred to are clear that the proceedings were tampered with and the Court of Appeal, the Attorney General and the parties were aware that the record was deficient. He contended that any subsequent appeal based on the subordinate court must be premised on the charge sheet and judgment and where an appellate court would not correlate proceedings with the charge sheet and charges then there is a fundamental defect as the judgment forms the fundamental document of appeal. He therefore submitted that the petitioner was denied his right to a fair hearing as the record of proceedings from the High Court and the Subordinate Court were tampered with and parts of it were missing and incomplete. He urged that an appeal heard and decided on the basis of a tampered and incomplete proceeding violates the right to a fair hearing.
8. Counsel submitted that in the circumstances, the Court of Appeal failed to interrogate the issue of the record and the only remedy was to order a re-trial. He pointed to **Article 21** of the Constitution which imposes a duty on the State and every State organ to ensure that fundamental rights are not breached hence the error of the Court of Appeal had to be remedied. The petitioner contended that in previous cases where the record was tampered with the Court of Appeal ordered a retrial. Counsel cited **Francis Ndungu Wanjau v Republic Nairobi CA Criminal Appeal No. 187 of 2002 (Unreported)** and **Benson Ndirangu Ndungu v Republic Nairobi CA Criminal Appeal No. 206 of 2007 (Unreported)**.
9. Ms Nyamweya, learned counsel for the State, submitted that the petition was brought on the basis that there was new and compelling evidence and that tampered proceedings cannot amount to new and compelling evidence. Counsel cited the case of **Ramadhan Juma Abdalla and Others v Republic Nairobi Petition No. 468 of 2012 [2013]eKLR**.
10. The respondent also submits that the Court of Appeal addressed itself to the issues. It ordered a correction and rectified the record in the course of hearing the appeal and made a determination founded on the rectified record. In substance, Ms Nyamweya submitted, there was no tampering and the record was reconstructed by the Court of Appeal. Finally, the respondent contends that the High Court does not have jurisdiction to review a decision of the Court of Appeal where the court exercised its jurisdiction properly.
11. Mr Wagara responded that the High Court had jurisdiction under **Article 165** of the Constitution to hear and determine the case and to enforce fundamental rights and freedoms. He cited the case of **Protas Buliba v Attorney General Kisumu Const. Ref. No. 3 of 2011** to support the position that the duty of the court is to protect fundamental rights and freedoms under the Constitution.

12. The judgment of the Court of Appeal was delivered before the Constitution came into force. As the Constitution is not retrospective, this matter must be determined in accordance with the provisions of the former Constitution. The issue then is whether the right to a fair hearing was violated. **Section 77(1)** of the former Constitution states, “*If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*”
13. The petitioner’s case in my view is misguided as the Court of Appeal granted him a fair hearing. The issue whether the proceedings were tampered with was dealt with by the Court when it adjourned the case to enable the appellants’ advocate to study the records as per the order of 19th May 2006 set out at paragraph 7 above. The Court of Appeal in its judgment of 23rd April 2010, dealt with the issue of the defective charge as follows, “*At the outset, Mr Marube focused his submissions on grounds 2 and 3 above. Concerning the grounds alleging that the charge sheet was defective and that there was no complainant or compliance with the section 214 of the Criminal Procedure Code, following a timely intervention by the Court to have the original record perused by the court, counsel did graciously abandon that ground because the charge sheet in the original proceedings did directly reflect all the necessary ingredients.*” It is therefore clear that the issue of the charge sheets and tampered records were matters before the court and even if they were not, these were issues that were known to the appellant and his counsel and which ought to have been raised. The issues cannot be re-opened more so before the High Court.
14. This brings me to the more important issue whether the High Court has jurisdiction to intervene and set aside the decision of the Court of Appeal on account of the violation of fundamental rights and freedoms by the Court. First an error in a decision of the Court of Appeal cannot be said to be violation of the right to a fair hearing. In ***Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385***, the Privy Council held that, “*In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event...*” [Emphasis mine]. The Court of Appeal adopted this dictum in ***Methodist Church of Kenya, Registered Trustees & Another v Rev. Jeremiah Muku and Another CA Civil Appeal No. 233 of 2008 [2012]eKLR***.
15. Flowing from the statement of principle I have cited, it is inconceivable that the High Court would deign to intervene in a matter decided by the Court of Appeal under the guise of enforcing fundamental rights and freedoms. There is nothing in the former Constitution that permits the High Court to assume such jurisdiction. The former Constitution and the authorities I have cited make it very clear, that the High Court cannot proceed along the path proposed by the petitioner.
16. Under the Constitution, the position is clearer. First it is only under **Article 50(6)** of the Constitution that the High Court can set aside a conviction affirmed by the Court of Appeal or the Supreme Court on the ground that, “*new and compelling evidence has become available.*” In any other circumstances, **Article 165(6)** is clear that the High Court shall not have supervisory jurisdiction over a superior court. To grant the orders sought in the petition would violate the injunction against the High Court exercising supervisory jurisdiction over a superior court.
17. In light of the reasons I have set out, the petition is dismissed with no order as to costs.

D.S. MAJANJA

JUDGE

Mr Wagara instructed by Wagara, Koyokko and Company Advocates for the petitioner.

Ms Nyamweya instructed by the Directorate of Public Prosecutions for the respondent.