



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Miscellaneous Application 72 of 2011**

**NICKSON AMBEI ASHIUNDU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

Before me is a Notice of Motion dated 25<sup>th</sup> November 2011 filed by the applicant (convict) **NICKSON AMBEI ASHIUNDU**. It was brought under **Article 50 (6) (A) and (B)** and **165** of the **Constitution of Kenya 2010** and **Rules 16** and **23** of the High Court Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual Practice Rules 2006. The prayers are as follows:-

- (a) THAT the Honourable Court may be pleased to order for a retrial of the Petitioner's case.
- (b) THAT the Honourable court do give directions as to how the trial will proceed.

The application has three grounds on the face of the Notice of Motion. Firstly, that the Petitioner has discovered new evidence that was not known at the time of trial. Secondly, that the petitioner desires to have the case retried in light of the new evidence. Thirdly, that it is in the interests of justice that the orders sought herein be granted.

The application was filed with a supporting affidavit sworn on 25/11/2011 by the applicant. The main point raised in the affidavit was that the applicant was not served with all the relevant prosecution evidence at the trial including the O.B. register to enable him distinguish the truth from untruth.

At the hearing of the application, the applicant tendered what is headed PETITION OF APPEAL, challenging the substance of the High Court Judgment delivered by Kimaru, J. in Kakamega H.C.CR. Appeal No. 56 of 2008 on 21<sup>st</sup> November 2011 on behalf of Lenaola, J. He however orally called this document written submissions.

I will ignore the PETITION OF APPEAL and the submissions therein as they are in the form of an appeal. The first reason for so doing is that what is before me is not an appeal but a Constitutional application for fair trial. It cannot be converted into an appeal. Secondly, I have no jurisdiction to sit on appeal from the decision of another High Court Judge. I cannot purport to sit on appeal regarding the Judgment in Kakamega HC Criminal Appeal No. 58 of 2008. That is for the Court of Appeal.

I now come back to the substance of the application. Learned State Counsel Ms. Ngovi opposed the application. Under **Article 50 (6)** of the Constitution of Kenya 2010 a person who has been convicted in a criminal case can petition the High Court for a new trial. The Article provides:-

**50 (6) 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.**

This application will fail. The first reason is that the applicant did not appeal to the Court of Appeal and to the Supreme Court from this court's decision which was made in Kakamega HC Criminal Appeal No. 58 of 2008 on 21<sup>st</sup> November 2011 before making the application. He also did not indicate what prevented him from so appealing within the time allowed by law or whether his attempt to appeal out of time was rejected and why. Secondly, the applicant did not demonstrate to this court the new and compelling evidence that came to his attention after the trial and when the said new evidence came to his attention to persuade this court to decide in his favour. The **Constitution of Kenya 2010 Article 50 (6)** requires that a petitioner for a new trial satisfies the above two parameters. In my view failure to do so means that the application will not succeed. The applicant has failed to satisfy either of the two constitutional parameters. His application is therefore not merited. It will not be successful.

Consequently, I find no merits in the application and dismiss the same.

*Dated and delivered at Kakamega this 14<sup>th</sup> day of March, 2013.*

**George Dulu**

**JUDGE**