



**REPUBLIC OF KENYA**

**High Court at Meru**

**Miscellaneous Criminal Application 10 of 2011**

**ROBINSON MWANGI MAINA.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**LESIIT J.**

**R U L I N G**

The Applicant has brought a chamber summons dated 22<sup>nd</sup> June, 2011. It has been brought under Article 21(2) of the Constitution 2010 together with 6<sup>th</sup> schedule of the same Constitution and rules 30, 31 and 42 of the Court of Appeal Rules. He sets out his application and the grounds upon which it is premised as follows:

- 1. That my rights to a fair trial were denied in the initial trial.**
- 2. That I have new and compelling evidence to provide, if this application is found meritorious and granted.**
- 3. That I pray to be present during the hearing and ruling of this application.**

The application is based on the following amended grounds:

- 1. That after the death of 1<sup>st</sup> accused (one Dickson Muthomi) the charge was withdrawn against him as discharge orders were entered by the court, section 214(1)(i) (ii) was not complied with in so doing.**
- 2. That the learned trial magistrate and one Judge among those who dismissed my final appeal were removed from office by the radical surgery and vetting of judges respectively.**
- 3. That the exhibits were planted on me by police since my arrest on 18.2.1999, I booked at the Meru Police Station alone vide OB No. 38 and with no exhibits at all (see page 28 last line)**
- 4. Section 72(3) (d) of the defunct Constitution was contravened as I was held in police custody for 21 days, far more than the time prescribed in Law (see page 13 of the CA Judgment).**
- 5. That law was not complied with during trial because IP Maccus Mwara played double role as a police officer (see OB Nchiru Police Station on 18/2/1999 and acting as statement officer (see page 59 line 15-16)**

**6. That I request for the availability of the OB No. 38/18/18/2/1999 Meru Police Station, OB of 18<sup>th</sup> 02/1999 Nchiru Police Station and Criminal Case No. 605/1999 – Meru Law Court, during the hearing of the Petition.**

The application is supported by an affidavit sworn by the applicant but which is not commissioned. It has five paragraphs as follows:

1.

The state filed grounds of opposition dated 13<sup>th</sup> March, 2013. In those grounds of opposition four grounds are cited as follows:

1. The court has no jurisdiction to entertain the application.
2. The Applicant's application is misconceived and an abuse of court process. The Applicant has wrongly understood the law.
3. The Applicant has not demonstrated any new and compelling evidence to warrant a new retrial.
4. Therefore, in the light of the clear statutory provisions of the Constitution, the entire application is made in ignorance of the law and wasting the Hon. Courts precious judicial time and should be dismissed.

The Applicant was unrepresented. He filed written submissions which he relied on in support of his application. Those written submissions are lengthy and exhaustive. I have considered them. The application is opposed. Mr. Jackson Montende learned state counsel represented the state in this application. I have also considered the submissions made by counsel. Out of the submissions by both the applicant and the state the issues that arise for determination are as follows:

- 1. Whether the application has been brought under section 84(1) of the Constitution (repealed) or whether it has been brought under Article 50(6) of the Constitution 2010. Whichever section of the law has been invoked the court has to determine whether it has jurisdiction to issue the orders sought by the applicant.**
- 2. If the court finds that it has jurisdiction; whether there is new and compelling evidence to justify the court to order a retrial of the Applicant's Criminal Cases.**
- 3. Whether the dismissal of the trial magistrate and judge or judges who heard the Applicants case and Appeals entitles the Applicant case to be heard again.**
- 4. Whether the Applicants age should incline the court to order a retrial.**

In regard to the issue of the jurisdiction involved the Applicant urged that he brought the application under section 84(1) of the repealed constitution. He urged that the provisions of section 84(1) of the repealed Constitution were similar to the provisions of Article 23 of the Constitution 2010.

The Applicant submitted that Section 84(1) was replaced by Article 23(1) of the Constitution and suggested that in absence of rules under the Constitution 2010 the old (Gicheru) rules should be the ones in use. He submitted that there was no limitation period for bringing a claim for enforcement of fundamental rights and that therefore his application is within time. The Applicant urged the Court to accept his application as falling under Article 50(6) and find that he is rightly and properly before this court.

He then argues that under Article 262 of the Constitution 2010 the rights of a party available to them under the repealed constitution were saved under Article 262 of the Constitution 2010 despite the repeal of the old constitution. The Applicant urged that clause 6 of the 6<sup>th</sup> schedule of the Constitution 2010 provides that all the rights and obligations of the government of the public that existed under the old

Constitution shall continue as rights and obligations under the new Constitution.

Mr. Motende in response to the issue of jurisdiction urged that this court has no jurisdiction to entertain the application because the Applicant had not brought himself within the relevant provisions of the law and that the order sought do not fall within the jurisdiction of this court. Mr. Motende expressed lack of clarity on the Applicants part on the law he was involving to bring the application. Mr. Motende submitted that the applicant was seeking this court to rehear his appeal and yet having exhausted the entire appellate jurisdiction available to him to the Court of appeal level. This court cannot entertain his appeal ones again.

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The Applicant urged that there was new and compelling evidence that would warrant this court to order a retrial of his case. The basis of his petition were two elements. He talked of the OB 24 of 18<sup>th</sup> February 1999 from Meru Police Station and the cell register of the same day i.e. 18<sup>th</sup> February 1999 and the same Police Station. The Applicant had applied to this court to have the O.B. and the cell register produced which the O.C.S. of Meru Police Station availed. The OB shows that the Applicant was arrested alone and booked at the Meru Police Station in O.B. No. 24 on the 18<sup>th</sup> February, 1999. The cell register shows that the Applicant was placed in the cells on the same day. The Applicant urged the court to compare the information in O.B. No. 24 with O.B. 38 of 18<sup>th</sup> February 1999 from Meru Police Station which was produced at the trial in the lower court. The Applicant urged that the entry had material contradictions with O.B. no. 24 and that those material contradictions were the basis of his argument that evidence was planted against him and that on that ground he had new and compelling evidence to support an order for retrial. The O.B. entry NO. 38 of 18<sup>TH</sup> February 1999 shows that the Applicant was arrested together with two ladies whose names are given as Harriet Kendi Raichau and Purity Kaungi with shop goods, cigarettes and batteries which were recovered from the house Raichau. The Applicant highlighted the differences between O.B. 24 and O.B. No. 38 as being in the time of arrest the persons in whose company he was and the exhibits that were recovered and urges the contradiction were so material as to show that his conviction had no basis.

Mr. Motende in reply submitted that the court should not consider the to OBs and cell register as these were not new evidence. Mr. Motende urged that the OB and cell register were available and the Applicant could easily assess them at the time of trial if he exercised diligence. Alternatively Mr. Motende urged the court to consider the differences between the two O.Bs and ask itself weather the omission of the exhibits could have resulted into a miscarriage of justice. Mr. Motende submitted that it did not and that the same cannot warrant a retrial.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MAY, 2013.**

**LESIIT, J**

**JUDGE.**