REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 468 OF 2012

BETWEEN

RAMADHAN JUMA ABDALLA.....1ST PETITIONER

SYRIACUS ONYANGO OPERA.....2ND PETITIONER

SELESTER OTURI LINYONYI.....3RD PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petition before me is dated the 11th of October, 2012 and is supported by an Affidavit sworn on the 11th October, 2012 by the 1st Petitioner on his own behalf and on behalf of the 2nd and 3rd Petitioners. The Respondents filed Grounds of Opposition dated 7th of November, 2012.

2. The background to the Petition is that the Petitioners were charged and convicted of the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code, Cap 63** and thereafter were all sentenced to death in Kibera CM's Criminal Case Number 8478 of 2003. The Petitioners appealed against both conviction and sentence vide High Court Criminal Appeals Numbers 479, 480 & 481 of 2004, which Appeals were all dismissed and the sentences upheld. The Petitioners then preferred appeals to the Court of Appeal being Court of Appeal Criminal Appeal Numbers 244, 2481 and 298 of 2007 which were again dismissed and the Court of Appeal upheld the sentence of the other Courts.

3. The Petitioners are aggrieved by the hearing and determination of their appeals at the Court of Appeal and they allege that the said Court failed and/or neglected to act in an impartial manner and instead acted in alleged flagrant breach of **Article 50** of the **Constitution** which protects the right to a fair hearing in all criminal proceedings. The Petitioners add that as a result they were also not accorded a fair trial contrary to **Article 25(c)** of the **Constitution** of Kenya and it is for these reasons that they seek the following orders:

a. That this Honourable Court declares that their fundamental right as to fair hearing has been contravened.
b. This Honourable Court grants the Petitioners a fair trial by ordering a re-trial.

4. The Petitioners further contend that the Chief Magistrate, Kibera Law Courts confirmed that the record of appeal was tampered with and that the said information was contained in a letter dated the 24th of August, 2009. Further, that the Court of Appeal directed the Deputy Registrar of the High Court to prepare whatever record was available with regard to the Petitioners Appeals to facilitate determination of the same and that the Principal Deputy Registrar of the High Court in response inferred that the record of appeal as presented to the Court of Appeal was in doubt.

5. The Petitioners now allege that the Court of Appeal heard and determined their appeals based on a record of appeal that was incorrect and totally at variance with the original handwritten proceedings of the trial Court and in that regard, the Petitioners also state that they filed a complaint with the Judges and Magistrates Vetting Board against the Judges of Appeal who heard those appeals but no action was taken against them.

6. For the above reasons, the Petitioners seek the orders elsewhere set out above and the Respondent in his Grounds of Opposition states that the Petition is a sham, is odious and a mere red herring and that it has not satisfied the requirements of **Article 50 (6)** of the **Constitution**. Further, that the errors with regard to the record of appeal, if any, are ordinary errors and do not constitute a breach of fundamental rights or freedoms. That the errors made in the course of adjudication by Courts of law should be cured by invoking the mechanism and procedures such as an appeal or review which opportunity the Petitioners had and were granted and the Respondent affirms that the case against the Petitioners was proved beyond reasonable doubt and that the errors on the record do not go to the root of the evidence or the legality of the decisions of the three courts that scrutinized that evidence and reached similar decisions.

7. Having considered the rival Submissions, I find that the issue for determination before this Court is whether the Petitioners' rights to a fair hearing were infringed and in the circumstances, whether they are entitled to a new trial in accordance with **Article 50 (1), (2)** and **(6)** of the **Constitution**. Before I determine that issue, I insist that it is imperative and most urgent at this preliminary stage to set the threshold that must be met for any party alleging breach of their fundamental rights and freedoms and it is this; that the allegations must be stated in all clarity and the illustrations on infringement, threat and/or violation demonstrated with some measure of particularity. In the case of **Nurani vs. Nurani (1981) KLR 88 at page 99** I believe this threshold was further qualified on Court procedures when the court held that: ***"Whether the proceedings are of a civil or criminal nature, the court will not protect an imaginary deprivation of a fundamental right or allow it to be capriciously pushed to absurd lengths…."***

I agree and it is also my view that whereas scientific exactitude is not what a Court expects of a claimant, surely the Court must not be treated to the mere expression of a complaint of alleged breach of fundamental rights without extrapolation.

8. Having established that foundation, **Article 50 (6)** of the **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, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available"

9. The Petitioners have exhausted their appellate avenues and have therefore no recourse under **Article 50 (6) (a)** and I am now called upon to determine whether there is **new and compelling evidence that has become available.** Black's Law Dictionary, 8th Edition defines '**new**' as: *"**recently discovered, recently come into being"*** and the Concise Oxford English Dictionary defines **compelling** as: *"**powerfully evoking attention or admiration".*** It follows therefore that this evidence must have been recently discovered or has just come into being and is

evidence that will evoke attention and rouse a great deal of interest.

10. A Petition of this nature, under **Article 50 (6)** is one of the first of its kind under our new constitutional dispensation. A clear reading and interpretation of this **Article** denotes that the right guaranteed under it is not a right of appeal or review and in my view, the jurisdiction granted to the High Court would not be to determine afresh issues that had been canvassed stated above there must be new and compelling evidence for a retrial to be ordered.

11. **What do the Petitioners have in their basket?** They have based their grievance on alleged errors on the record of appeal which the Petitioners state, and relying on the account of the letters between the Court officials, is in doubt and was tampered with. It is noteworthy that the Petitioners do not illustrate what the errors are, or give a comparison between Court records that clearly directs this Court to identify lucidly the issue being advanced by them. It is also evident from the records that these errors were denoted at the time the appeal was being filed at the Court of Appeal and the Court of Appeal dealt with the Petitioners' Appeals well aware of that apparent anomaly but nonetheless considered the totality of the matters placed before the trial Court and later subjected to a fresh analysis by the High Court and found that the evidence was credible and was proof beyond reasonable doubt that the Petitioners were indeed guilty of the offence of robbery with violence and that their sentences were meted out within the law.

12. The Petitioners therefore had the opportunity before the Court of Appeal to raise the issue of the apparent the errors between the differing records and if they failed to do so apparent I can only state that;

> ***"... Hence, the generally applied principle of law and equity to the effect that: he who claims a right, must not (like Rip Van Winkle) sleep or slumber on his right. (Attorney General of the Republic of Uganda vs. Omar Awadh & 6 Others EACJ Appeal No.2 of 2012)" applies to them.*** *In* ***Rodgers Ondiek Nyakundi & 2 Others vs. The Republic High Court at Kisii Criminal Appeal No. 135 of 2006*** *Sitati, J holds that:* ***"There is no doubt that the Applicant had every opportunity to apply to adduce fresh evidence before or at the hearing of his first appeal. He could did not do so. The door was closed and this court has no power to re-open it."***

13. I agree and would only add that the expectations of **Article 50(6)(b)** of the Constitution is that new evidence has to be placed before the High Court. A record of proceedings is not new evidence and cannot by any stretch of imagination be denoted as such.

14. In the end therefore, the Petitioners had their day in Court. They were lawfully sentenced to death and later that sentence wascommuted to life in prison. Their attempts to dislodge their conviction and sentence, ingenious as it was, cannot meet the threshold set by the Constitution and must fail. As one popular author put it, when all appeals have run their course, ***"and there is no procedure, mechanism, obscure statute, technicality, loophole or Hail Mary left in [a] throughly depleted arsenal"*** then there is nothing left to be done. That was John Grisham in one of his popular fictions but Statement apt to reproduce in this case.

15. The Petition is weak and lacks merit. It is hereby dismissed with no orders as to costs.

16. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

No appearance for Parties

Order

Judgment duly read. Copies to be sent to Petitioners at Kamiti Prison.

ISAAC LENAOLA

JUDGE

AT 9.40 A.M.

Petitioners present.

Order

Judgment duly read to them.

ISAAC LENAOLA

JUDGE