



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO.58 OF 2013

WILLIAM OKUNGU KITINYAAPPLICANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The applicant and another were convicted by the Chief Magistrate at Kisumu of robbery with violence c/s 296(2) of the Penal Code whose particulars were that on 30/12/01 at Arina Estate in Kisumu District of Nyanza Province they jointly with others and while armed with a home-made pistol robbed Norah Adhiambo Magak of a T.V. Set, a video deck, a radio, a suit case, two speakers, mobile phone, two compact disks, one air fan, a remote control all valued at Kshs.90,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Norah Adhiambo Magak. They appealed against the conviction and sentence to the High Court in Kisumu in Criminal Appeals Nos.205 and 206 of 2004. The appellant was unsuccessful. The conviction and the death penalty were confirmed. He appealed to the Court of Appeal at Kisumu in Criminal Appeal No.211 of 2006. He was not successful. The judgment was delivered on 20/6/08.

On 17/9/13 he filed this petition claiming the violation of his fundamental rights and freedoms under Articles 25(a), (c), 26(1), (3), 27 (1), (2) and (4), 28, 29(a), (d) and (f), 50(2), (b), (p) and (6) (a), (b) and 165 of the Constitution of Kenya. In the grounds and affidavit in support of the petition he stated that he was dissatisfied with the trial process, conviction and the death penalty imposed; that the learned judges had erred in both law and fact by basing the conviction on the doctrine of recent possession without finding that the person found with the items in question had not been charged and neither had she testified; that there was insufficient evidence of recovery of the items in respect of which he was convicted; that the prosecution had failed to prove the case beyond doubt; and that a material witness, a taxi driver, had not been called as a witness. He asked that it be declared that the death penalty imposed violated his right to life. He further sought that the case be reviewed with the consequence that there be a fresh trial as contemplated under Article 50(6)(b) of the Constitution.

When I heard the applicant, who as not represented, all that he was seeking was a fresh trial. His contention was that there was new and compelling evidence. His case was that he did not get a fair trial because he had been arrested by the police who had booked him for the offence of being drunk and disorderly and yet charged him with the offence of capital robbery on which he was convicted. He stated that the production of the Occurrence Book in the trial would have vindicated him. He stated that both in the trial court and in the High Court he made the Occurrence Book an issue but it was never produced.

Secondly, he denied that he led to the recovery of the stolen items. The items were found in a lady's hose. She was the 5th accused in the trial court. She was apparently acquitted.

Lastly, he denied that he was arrested in a taxi vehicle and complained that the driver of the alleged taxi had not been called to testify.

Mr. Mongare for the State conceded the application. He agreed with the applicant that had the Occurrence Book been produced the outcome of the case would possibly have been different. Counsel was of the view that, to that extent, the Occurrence Book was a new and compelling evidence.

Article 50 of the Constitution deals with the fair hearing of a dispute or criminal case. Under Article 50(6) a person who is convicted of a criminal offence may petition the High Court for a new trial if -

“(a) the person' 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.”

My take is that the applicant is challenging the findings of the trial court, the High Court and the Court of Appeal. These findings were the basis for his conviction and sentence. Quite unfortunately, this court has no jurisdiction, through this petition, to discuss, or pass judgment, on the merits of the process that the applicant has gone through. It was stated in MOHAMED ABDULRAHMAN SAID AND ANOTHER .V. REPUBLIC, Misc. Criminal Application Nos 66A and 66B of 2011 that:

“the right to a new trial is not an avenue for a further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal.”

The issue of Occurrence Book was admittedly raised during the trial and in the High Court. The courts were apparently not persuaded that its production was material. One cannot therefore say that this is a new matter.

The applicant was convicted on the doctrine of recent possession. The evidence was that on the night of 30/12/01 six thieves raided the complainant's house at Arina Estate in Kisumu town. They had a sword and pistol They took her property after assaulting her. The incident was reported to police who swung in action. They spotted a vehicle approaching from Kondele area (which is near Arina Estate) in which were occupants who included the applicant. The vehicle was intercepted and stopped. The applicant was interrogated and led to the recovery of the complainant's items in a lady's house. The applicant denied that he was in the attack, in the vehicle or that he had led to the recovery of the goods. The three courts, after due consideration, found him to have been in recent possession of the goods in circumstances that led to the conclusion that he was one of the robbers who had attacked the complainant. The questions of recent possession and whether or not the vehicle's driver or the lady ought to have been called as witnesses were live issues before the three courts and findings were made on them. They were not new issues.

The applicant did not complain to the High Court or to the Court of Appeal that the death penalty that was visited upon him violated his right to life. The Constitution in its Article 26(3) and section 204 of the Penal Code do recognise the death sentence as a legal sentence in Kenya (CHARO KARISA THOYA .V. REPUBLIC, Criminal Appeal No.274 of 2002 at Mombasa).

For the avoidance of doubt, where an applicant petitions the court under Article 50(6)(b) for a fresh trial he has to demonstrate that he has come by new evidence which was unknown to him at the time of the trial; that he could not have known, or come by the evidence, by the exercise of due diligence; and that such evidence is so material that had it been known at the time of the trial it could have changed the result of the case (WILSON THIRIMBA MWANGI .V. DPP, HC Misc. Application No.271 of 2011 at

Nairobi). There was no demonstration of these in this petition.

In short, the applicant's petition is without merit and is hereby dismissed.

Dated, signed and delivered this 16th October, 2013.

A. O. MUCHELULE

J U D G E