



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Petition 197 of 2011

**LEUTENANT COLONEL ROBERT TOM MARTINS
KIBISU.....PETITIONER**

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, **LEUTENANT COLONEL ROBERT TOM MARTINS KIBISU**, has brought this petition for alleged breach of his constitutional rights.
2. In his petition dated 6th October, 2011, the petitioner seeks the following orders:-
 1. A declaration of rights,
 2. An injunction;
 3. A conservatory order
4. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
5. An order for compensation; and
6. An order of judicial review.
7. The respondent to meet the cost of the suit.
3. The petition is supported by an affidavit sworn by the petitioner on the 6th October, 2011.
4. The respondent opposes the petition on the following grounds:
 1. The petition is misconceived, frivolous, vexatious, incompetent, improperly before court and an

open abuse of the court process.

2. The petition has not met the prerequisite requirement for the grant of the orders sought.
3. The matters raised by the petitioner have been raised in other courts and determined therein and as such the High Court is *functus officio*.
4. No sufficient grounds have been advanced to warrant the grant of the orders sought.
5. The petitioner is guilty of material non-disclosure.
5. A replying affidavit sworn by Mr. Geoffrey Obiri on 9th November, 2011 was filed in support of the respondent's case.
6. Both parties filed written submissions which they highlighted before me on the 25th of January 2012. The petitioner was in person while Mr. Mule appeared for the respondent.

The Petitioner's Case

7. The petitioner's case is that there is new and compelling evidence which is unchallenged by the respondent and which entitles him to a new trial. Article 50(6) gives a party a right to petition the High Court for a new trial and the new and compelling evidence meets the criteria for a new trial. He submitted that he had a legitimate expectation that his appeal to the Defence Council would be dealt with expeditiously. He argued that it was not in doubt that he was tried illegally by the Defence Council and the High Court abetted and sanitised an illegality. He referred to annexures **TOM 1** and **TOM2** in his affidavit.
8. He submitted further that there was a stay granted in **Misc. Civil Application No. 365 of 2005** which stay has never been disturbed. He stated that he filed an appeal against the Court Martial's decision in the High Court being **Court Martial Appeal No. 1 of 2005** which was dismissed. He has annexed the decision of the High Court in the Court Martial Appeal as **TOM3**.
9. In support of his argument that there was new and compelling evidence, he submitted that after he obtained the evidence of the proceedings in 2007, he filed contempt proceedings and the Presiding Officer **Brigadier Maurice Oyugi** filed an affidavit which he has annexed to his affidavit as **TOM 4**. He states that the affidavit refers to 10th March 2005 as the day on which the Court Martial sat but he argues that the Court Martial did not sit on that day but sat on the 7th April, 2005. He therefore argues that since the stay granted by the court in **JR 365/2005** had not been disturbed, the Court Martial sat on 7th April, 2005 while there was a conservatory order.
10. The petitioner argues that the new and compelling evidence that he relies on is contained in the affidavit of **Alexander Ochoo Alela** (annexure **TOM 5**) which is a return of service to the effect that Mr. Alela was locked up at Lang'ata Police Station when he went to serve the court order on the Court Martial and so he could not effect service.
11. The petitioner submitted that he underwent disciplinary proceedings by the Garrison Commander, Kahawa Garrison on 28th July, and 20th August, 2004. He was aggrieved by the decision of the Garrison Commander and appealed to the Defence Council, but the Defence Council has never dealt with the matter, and that this was the subject of his application for Judicial Review in **JR 365 of 2005**.
12. He submits that he also filed **Criminal Revision Case No. 116 of 2008** in the High court but the High Court dismissed his application for want of jurisdiction. He argues that the court now has jurisdiction by virtue of Article 50(6) of the Constitution.
13. The petitioner referred to paragraph 3 and 9 of the affidavit in support of his petition and submitted

that he and not Col. Philip Mumo was the Commanding Officer School of Signals. He argued that certain issues that were germane to the issue were not considered by the Court Martial.

14. It was the petitioner's contention also that section 115(3) of the Armed Forces Act is unconstitutional and does not meet the threshold of Article 24 of the Constitution as it denies one a right of appeal to a higher court and the right to a second appeal in criminal matters. It was also, in the petitioner's view, in violation of Articles 27, 28, and 50, in particular 50(q).

15. He asked the court to strike out the respondent's replying affidavit dated 3rd November, 2011 sworn by Geoffrey Obiri as the deponent, a State Counsel, is not a party to the proceedings.

16. Finally, it was the petitioner's submission that the respondent will not suffer any prejudice if the matter is taken back to trial.

The Respondent's Case

17. Mr. Mule presented the case for the respondent. He relied on the grounds of opposition filed on behalf of the respondent dated 21st October, 2011, the affidavit sworn by Geoffrey Obiri on the 9th of November 2011 and the written submissions dated 23rd November 2011.

18. Mr. Mule referred to the documents exhibited by the petitioner in his petition and supporting affidavit and submitted that the matters that the petitioner has raised in this petition are res judicata. He asked the court to note that the petitioner states in his documents how the matter started with a Court Martial and ended in the High Court; that at page 1 of his bundle he has stated that the matter is before the Court of Appeal in **Appeal No. 137 of 2007**.

19. With regard to the submission by the petitioner that there had been contempt of Justice Makhandia's order issued in **JR 365 of 2005**, Mr. Mule submitted that the petitioner has not shown what he did with regard to the disobedience of the order and how it was prejudicial to him. He submitted that the petitioner was given audience as shown in annexures **TOM3** and **TOM6** of his pleadings by the High Court so there was no prejudice.

20. With regard to the contention by the petitioner that there was new and compelling evidence under Article 50(6), Mr. Mule submitted that the petitioner has not exhibited new and compelling evidence which he did not have and could not acquire while exercising due diligence at the time of the trial. The affidavit of Maurice Oyugi and the orders of Makhandia J. were both in the court file at the time a decision was reached. They are not new and compelling evidence. The rank and status of the petitioner as a military officer was also known to the court. He was also the one who was duty bound to bring this to the attention of the court.

21. On the issue of limitation of the right of appeal by section 115 of the Armed Forces Act, Mr. Mule submitted that the processes the petitioner underwent cannot be adjudicated in the context of the new Constitution. To open them in this matter would be to open a flood gate of matters of a similar nature.

22. Finally, Mr. Mule addressed himself to the argument that the affidavit of Geoffrey Obiri should be struck out. He pointed out that Mr. Obiri had demonstrated his capacity to swear the affidavit at paragraph 2 of his affidavit. The Director of Public Prosecutions had entered appearance for the Republic, and the petitioner had not challenged this, nor had he challenged the delegation of power to Mr. Obiri. The issue that the petitioner was raising was a technicality not allowable in constitutional petitions.

23. He asked the court to dismiss the petition.

The Facts

24. Before embarking on an analysis of the merits of the parties' respective cases, let me set out the facts that emerge from the pleadings and submissions of the parties, particularly the pleadings by the

petitioner.

25. The petitioner was a member of the Armed Forces of Kenya who underwent disciplinary proceedings including a court martial in 2004. At paragraph 2 of his affidavit, the petitioner avers as follows:

‘THAT an abstract of evidence was prepared against me and I duly appeared before the Garrison Commander twice on 26th July, 2004 and 26th August, 2004 on the same charges in a summary trial on trumped up charges that bordered on caprice. The charges were instituted by a person who was neither my Commanding Officer nor my Appropriate Superior Officer. The sentence was harsh and being aggrieved, I appealed through a redress to the Defence Council, annexed herewith and marked TOM ‘1’ is a copy. To date the Defence Council has never addressed the matter, despite reminders.’

26. Dissatisfied with the proceedings of the court martial, the petitioner filed a judicial review application **Misc. Application No. 365 of 2005** in which Justice Makhandia granted orders of stay. However, the court martial proceeded and he was convicted. The judicial review application is still pending in court according to the averments by the petitioner at **paragraph 6** of his affidavit where he states as follows:

‘THAT the Court Martial had been stayed from convening, sitting and trying me a matter that is live and proceeding in the High Court Constitutional Judicial Review Division and the Court of Appeal for breach of fundamental rights and freedoms in matter number CA 137 of 2007, Court of Appeal Order dated 18th November, 2008. The Court of Appeal is awaiting the outcome of this Courts’ decision.

27. The petitioner also filed an appeal in the High Court against the decision of the court martial. This was **Court Martial Criminal Appeal No. 1 of 2005: Lt. Colonel Robert Tom Martin Kibisu -v- Republic.**

28. The petitioner also filed an appeal in the Court of Appeal being **Civil Appeal No. 137 of 2007** between the petitioner and the **Attorney General, the PS Ministry of Defence and 3 Others.** It is not clear from the pleadings what the subject matter of the appeal in the Court of Appeal is in respect of. However, the heading of the Court of Appeal Ruling which is in the petitioner’s List of Documents and Authorities dated 24th October, 2011 indicates that it is an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh J dated 29th March 2007 in **H.C. Petition No. 509 of 2006.** Civil Appeal 137/2007 appears not to have been heard and determined, and the petitioner has not annexed copies of the pleadings and judgment in **High Court Petition No. 509 of 2006.**

29. According to the petitioner, he also filed **Criminal Revision No. 116 of 2008** which was dismissed.

30. He has now filed the present petition before this court.

The Issues

31. I must state at the outset that the petitioner’s pleadings and written submissions differ considerably from what he submitted orally in court. Further, in his submissions before the court, he addressed himself to two main issues: first, that he had found new and compelling evidence that entitled him to a new trial under Article 50 of the Constitution; secondly, that Section 115 of the Armed Forces Act was unconstitutional for limiting the right of a member of the armed forces a right of a second appeal. He did not address himself to the prayers sought in his petition.

New and Compelling Evidence

32. In his submissions, the petitioner argues that the new and compelling evidence that would entitle him to a new trial is contained in the affidavit sworn by **Brigadier Maurice Oyugi** in reply to his application for contempt for disobedience of the order of Makhandia, J. The other item that he submits is

new and compelling is the averment by the process server that he was arrested and detained at Lang'ata Police Station when he went to serve the court order.

33. Article 50 of the Constitution provides the rights to which an accused person facing trial is entitled to. With regard to the adduction of new evidence, the relevant part of Article 50 is sub-Article (6) which provides as follows:

(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.

34. My reading of this provision of the Constitution is that the '**new and compelling evidence**' must relate to the criminal trial; must be such as would not have been available to the petitioner with the exercise of due diligence at the time of the trial, and would be such as would make a difference to the court's finding with regard to his guilt or innocence.

35. In the matter before me, the 'evidence' that the petitioner refers to relates to the service of a court order on a court martial. He depones as follows in his affidavit:

Para 13. THAT on the 15th April, 2005 at 3.00 pm or thereabouts the Court Process serve, Mr. Alexander Ochwo Alela did serve the second Respondent with the Orders and a Penal Notice dated 14th April 2005, which information I verily believe to be true. Annexed herewith and marked 'TOM 5' is a copy of the Affidavit of return of service indicating the same.

Para 14. THAT upon service of the said Orders and Penal Notice, the Respondents locked up, Mr. Alexander Ochwo Alela, Court process server at Langata Police Station on trumped charges so as to defeat the Course of Justice, thus aiding and abetting the flouting of an injunction. There are no proceedings on records of what transpired from about 3.00 p.m. 15th April, 2005 to Saturday 16th April, 2005.

36. The service of a court order does not, in my view, pertain to the evidence that was presented before the court martial that resulted in the petitioner's conviction, and it cannot be the '**new and compelling evidence**' contemplated by Article 50(6) of the Constitution.

37. In any event, however, a two judge bench of the High Court (Lessit and Makhandia JJ) in **Court Martial Criminal Appeal No. 1 of 2005 Lt. Colone Robert Tom Martin Kibisu -v- Republic** considered at length the issue of the service of the order of stay issued by Justice Makhandia and noted as follows in the judgment annexed to the petitioner's affidavit as **TOM3**:

'We have examined carefully the entire proceeding of the Court Martial and all the arguments raised within those proceedings and rulings; together with the submissions made by both counsel for the Appellant and Respondents before us. We find that the Court Martial was convened on the 16th March, 2005 pursuant to a convening order signed by LT. Gen Kianga, Commander, Kenya Army. We are satisfied that at the time the Court Martial convened, the High Court had already issued the order of stay of the Court Martial dated 15th March, 2005. We find that the High Court order was never extracted and served upon the Court Martial or the Respondents named in it. Instead, on 15th March, 2005, the proceedings of the High Court were served indirectly on the 1st Respondent. The Appellant's Counsel, who also defended the Appellant at the Court Martial, presented an Application before the High Court on 8th April, 2005 in which she sought unsuccessfully, the extension of time to serve the Order of Stay of Proceedings. That means that the order of 15th March 2005 staying the proceedings of the Court Martial was the only order of Stay the Appellant had which was effective for 21 days from said date. By 7th April, 2005, the Stay Order had expired before

being served upon the Respondents and therefore it never took effect. We find and hold that no order stopping the proceedings of the Court Martial was served on the Court Martial at any one time and that therefore the proceedings were not defective or a nullity for non-compliance with any High Court Order.(Emphasis added)

38. Even were this court to have jurisdiction to order a re-opening of any of the several matters that the petitioner has filed in court (it is not clear from his pleadings and submissions precisely what he wishes to re-open) which, as I shall shortly illustrate, the court has no jurisdiction to do, a court of competent jurisdiction has already made a very clear and unequivocal finding about the order of stay granted to the petitioner by Justice Makhandia: it lapsed before it was extracted, and an attempt to extend it failed. There is, therefore, no new and compelling evidence of any kind that would warrant the re-opening of the petitioner's trial even were the court competent and minded to do so.

39. Having considered the pleadings and submissions by the petitioner and read the various court decisions attached to his affidavit, I take the view that the petitioner is in effect asking this court to review the decisions not only of the Court Martial but of judges of concurrent jurisdiction, While this court has jurisdiction to determine questions regarding alleged violation of the Constitution or interpretation of the Constitution, it is merely a division of the High Court and has no powers superior to those of other divisions. As the Court of Appeal observed in the case of **Peter Nganga Muiruri -v- Credit Bank Limited & Another Court of Appeal Civil Appeal 203 of 2006**

'There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a division of the High Court.'

This court has no jurisdiction to re-open matters that have been handled and determined by other divisions and judges of the High Court.

40. The petitioner was tried and convicted by a court martial. He appealed to the High Court in **Court Martial Criminal Appeal No.1 of 2005**. He filed **Judicial Review Misc. Application No. 365 of 2005** which he appears to have abandoned. He also filed **High Court Petition No. 509 of 2006** which was heard and determined and against whose decision he filed **Civil Appeal No. 137 of 2007** in the Court of Appeal. He also filed and lost **Criminal Revision No. 116 of 2008**. The matter is clearly res judicata and it is time to let it rest.

Is Section 115 of the Armed Forces Act Unconstitutional?

41. The petitioner's second argument is that the provisions of section 115 of the Armed Forces Act are unconstitutional for denying members of the Armed Forces a right to a second appeal. The section provides as follows:

115 (1) Subject to this Part, where a person has been convicted by a court martial -

(a) the person convicted may, with the leave of the High Court given pursuant to section 116, appeal to the High Court against the conviction, or against the sentence, or against both;

(b) the Attorney-General may, in any case, within forty days of the promulgation of the conviction, appeal to the High Court against the sentence.

(2) Subject to this Part, where a person has been acquitted of a charge by a court martial, the Attorney-General may, within forty days of the acquittal, appeal to the High Court against the acquittal.

(3) The decision of the High Court on any appeal under this Act shall be final and shall not be subject to any further appeal.

42. Does the provision of section 115(3) with regard to appeals from a decision of a court martial contravene the provisions of the Constitution? Under Article 50 (q) of the Constitution, an accused person has a right,

‘(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.’(Emphasis added)

43. A reading of the constitutional provision set out above makes it clear that the right of appeal is subject to statutory provisions. An accused person has no automatic right of appeal, such right being circumscribed by the statutory provisions enacted by Parliament in accordance with the Constitution. Section 115 of the said Act is therefore fully in conformity with the constitution.

44. In light of the above findings on the two issues raised by the petition, this petition has no merit and is hereby dismissed with no order as to costs.

Dated and Delivered at Nairobi this 16th day of March 2012

Mumbi Ngugi

Judge