REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL MISCELLANEOUS APPLICATION 66A & 66B OF 2011

MOHAMED ABDULRAHMAN SAID..1ST APPLICANT

MASUO BAKARI TAJIRI ....2ND APPLICANT

=VERSUS=

REPUBLIC..RESPONDENT

RULING

This is the petition brought by the two Petitioners namely **MOHAMED ABDULRAHMAN SAID** and **MASUO BAKARI TAJIRI** in which they petition the High Court for a new trial in line with Article 50(6)(b) of the Constitution of Kenya and Article 20(1) of the Constitution of Kenya. The two Petitioners were originally charged vide CMCC 2047/1997 before the Chief Magistrate Mombasa with the offence **of ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.** They were tried and convicted and sentenced to death in accordance with the law. Their appeals to the High Court and to the Court of Appeal were both subsequently heard and dismissed. Following the promulgation of the New Constitution in August 2010 the Petitioners now apply for a re-trial of their case under the provisions of Article 50(6)(b) of the Constitution of Kenya. **MR. ONJORO** Advocate made oral submissions before us in support of the petition whilst **MR. TANUI** learned State Counsel opposed the same.

In his submissions Mr.Onjoro argued that the fair trial rights of the Petitioners were breached in the following ways:

(1) Their initial trial and subsequent appeals were founded upon a defective charge sheet and

(2) The record of appeal relied on by the superior courts was so full of errors as to be rendered incomprehensible.

He therefore seeks redress for a violation of the Petitioner's rights to a fair trial, by way of an order for a re-trial relying on article 23(1) of the Constitution. We propose to deal first with these issues before we proceed to address our minds to the arguments raised in support of Article 50(6)(b) of the Constitution of

Kenya.

Article 23(1) of the Constitution provides as follows:-

"23(1) The High Court has jurisdiction, in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights"

On the first limb of his argument learned counsel submits that the record of Appeal prepared and supplied to the Petitioners was full of errors, such that the Petitioner were unable to rely on the same to prepare their appeal to the High Court. We have carefully and anxiously perused the record of Appeal prepared in this matter. We do concede that it had several typing and spelling errors. However in our view this in no way rendered the record incomprehensible. We ourselves without the benefit of having listened to the original trial were well able to follow and comprehend the typed record. The errors complained of were in our view minor and consisted merely common spelling and typographical errors which did not in any way alter the content or meaning of the said record. We note that the Honourable Judges of the High Court who heard the Petitioners' first appeal did also take cognizance of the said errors but concluded thus:

"The type-written record of these Appeals is full of errors and has to be read with the hand-written one for clarity. In future deputy registrars who certify records as correct must mean so. Having said that we find no difficulty in understanding the evidence on record and in deciding these Appeals"

We support and agree with this finding of the High Court.

We further note that the Petitioners were present in court during their first trial. They heard and saw all the witnesses testify and had no need to rely on a poorly typed record. Similarly both Petitioners were represented during their appeal to the High court by senior counsel **MR. MAGOLO** and **MR. GAKUHI** who argued the appeal on their behalf. At no time did either counsel complain of the errors in the record and at no time did either counsel complain of inability to follow or comprehend the proceedings. It is quite clear that there was no prejudice occasioned to either Petitioner due to the errors in the record. We find that there was no violation of the Petitioners' rights to a fair trial in this respect and we dismiss this limb of the petition.

The second limb raised by Mr. Onjoro is that the charge sheet was defective. He argues that the Petitioners faced a charge of Robbery with Violence contrary to Section 296(2) of the Penal Code yet Section 296(2) refers only to the penalty for the offence of Robbery with Violence. At the outset we wish to state that this is a preliminary issue which ought properly to have been raised in the lower court at the point of plea-taking. We further note that the Petitioners also did not raise this issue in their appeals to either the High Court of the Court of Appeal. The Appellants had ample time to raise this issue before now. It is now being raised before us as an afterthought. Be that as it may we shall not shy away from addressing this aspect of the petition.

Having very carefully examined the Penal Code Cap 63 Laws of Kenya we note that Section 296(2) cannot be read in total isolation and must be read together with Section 296(1). We find it instructive to quote the entire provision of Section 296 as follows:

"296(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person, he shall be sentenced to death"

It is therefore quite correct that Sections 296(1) and 296(2) provide for the penalties for the offence of Robbery. The **definition** of the offence of Robbery with Violence is to be found in Section 295 which reads:

"Any person who steals anything, and, at or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery"

Therefore we do agree with counsel that the charge sheet ought to have made mention of Section 295 and to the extent that it failed to do so this charge sheet was defective. The key question is whether this defect was so fundamental as to nullify all subsequent proceedings. Did this defect so prejudice the Petitioners as to constitute a violation of their right to a fair trial? We think not and will proceed to give the reasons why we have come to this conclusion.

The charge sheet clearly read ***'Robbery with Violence'***. This was the charge read out to the Petitioners and was the charge to which they both responded. As such both were fully aware that they faced a charge of Robbery – there could have been no doubt in their minds about this. The particulars in the charge sheet made clear reference to the offence of Robbery with Violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the Petitioners on the date of taking plea. The evidence tendered during the trial related to the offence of robbery and not any other offence. We are guided by Article 50 of the Constitution which provides for a ***"Fair Hearing".*** Article 50(2)(b) provides:

"Every accused person has the right to a fair trial, which includes the right –

(a) ………………………………….

(b) To be informed of the charge, with sufficient detail to answer it.

We are satisfied that the charge sheet as framed did meet this threshold. The fact that the charge sheet referred to the offence of Robbery with Violence and the inclusion of the penalty section meant that both Petitioners were made aware of both the charge which they faced as well as the penalty if convicted. The fact that both Petitioners through their lawyer **MR. LEWA** fully participated in the trial by robustly cross-examining the prosecution witnesses convinces us that no prejudice was suffered due to the defective charge sheet.

Lastly on this point we shall rely on Section 90(2) of the Criminal Procedure Code which provides:

"(2) The validity of proceedings taken in pursuance of a complaint or charge <u>shall not</u> be affected either by a defect in the complaint or charge or by the fact that a summons or warrant was issued without a complaint or charge" *[our emphasis]*

This provision of law clearly provides that a defective charge sheet shall not affect the validity of the ensuing trial. We are satisfied that notwithstanding the failure to cite Section 295 of the Penal Code the Petitioners were accorded a fair trial, they suffered no prejudice and we find that there was no violation of their rights. As such we do hereby dismiss this limb of the petition.

We shall now proceed to consider the submissions made by learned counsel in support of his petition for a new trial. Article 50(6)(b) of the Constitution provides:

"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"

Therefore in order for a petition for a new trial to succeed the Petitioner must firstly prove that he has exhausted all legal avenues of appeal **and** secondly satisfy the High Court that new and compelling evidence has become available. From the records available to us we find as a fact that the Petitioners have

indeed exhausted all available avenues of appeal. Their last appeal to the Court of Appeal was dismissed on 5th August 2003. It is of course arguable whether in light of the establishment of a Supreme Court the Petitioners have infact appealed to the highest court available, but this is a matter which may require further elucidation. Be that as it may since this petition was brought before us we do intend to determine the same.

We do wish to make it perfectly clear however, that the right to a new trial **is not** an avenue for further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal. Having satisfied the requirements of Article 50(6)(a) we now turn to sub-clause (b) of that Article. This requires that **new** and **compelling** evidence be shown to exist. The word ***"new"*** is defined in the Concise Oxford Dictionary 9th Edition as:

"of recent origin" or "made invented, discovered, acquired or experienced recently or now for the first time"

In our understanding therefore ***'new'*** evidence must mean evidence that is recent in origin, has recently been discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals.

Mr. Onjoro refers to evidence from a certain ***'Onesmus Musia'*** as the new evidence. In no way can this evidence be defined as new. The said ***'Onesmus Musia'*** was referred to in the original trial by **PW2** **PC RICHARD EUPA,** in his testimony in the original trial at page 7 line 7 where he says:

"On 4.7.97 night I was on crime standby. Next morning 15.7.97 at about 7 A.M. I was about to book off when Onesmus Musia rung me that one lorry which was heading to Nairobi had been hijacked between Maungu and Nolara. I informed my OCS who instructed me to prepare to proceed to the scene …"

It is therefore quite evident that the existence this person ***'Onesmus'*** having been mentioned by **PW2** was a fact well known to both the Petitioners and their lawyers as early as the year 1996 when **PW2** gave his evidence. He is not a new witness who has suddenly been found after appeals had been heard and determined. Despite knowing of his existence the defence lawyer made no application in the original trial to have this Onesmus summoned to testify neither was any application sought to adduce additional evidence during the first appeal to the High Court. Clearly neither the Petitioners nor their lawyers felt that the evidence of this man was of any value. Why the sudden revived interest in a witness whose existence has been known for the past fourteen (14) years? This again is merely an afterthought.

Aside from the requirement that the additional evidence be ***'new'*** Article 50(6)(b) also requires that such evidence be ***'compelling'***. Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as ***"rousing, strong, interest attention, conviction or admiration"***.

Thus this evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision than that already reached. Mr. Onjoro refers to the said Onesmus as an ***'eyewitness'*** to the robbery incident. This in fact is not the correct position. **PW2** merely referred to Onesmus as the ***'reportee'*** i.e. the man who reported the incident to the police. A reportee need not necessarily be an eye witness. Any civic-minded citizen can report a crime or a suspected crime to the police. Having carefully perused the evidence before the trial court we find that no single witness has referred to the said Onesmus as having been present either during the incident or at the scene where the stolen lorry was recovered. His only role appears to have been to report the matter to police. His evidence would have been neither strong or convincing and would certainly not have added any value to the trial. No doubt this is why the prosecution failed to call him to testify and why the defence lawyer also did not bother to seek his attendance in court. Evidence of a reportee of a crime can in no way be deemed compelling. There is no challenge to the fact that this incident was indeed reported to the police or that as a result of this report the two Petitioners were arrested. Failure of such a witness to testify does not in any way prejudice an accused. The prosecution is under no obligation to call witnesses

who played such a minor role. In raising the issue of this so-called witness we find that the Petitioners are raising what is essentially a non-issue. Based on the foregoing we find that the evidence of this Onesmus cannot be termed either new (having been in the knowledge of both Petitioners since 1996) nor compelling (since his only known role was to report the incident to police). As such we find that the threshold for a new trial as set out in Article 50(6)(b) have not been met. We find no merit in the present petition and hereby dismiss the same in its entirety.

Dated and Delivered in Mombasa this 20th day of June 2012.

M. ODERO	G. NZIOKA
JUDGE	**JUDGE**

In the presence of:

Mr. Tanui for State

Mr. Onjoro for Petitioners