REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 135 of 2006

RODGERS ONDIEK NYAKUNDI ……..……..…….…….. 1ST APPELLANT

ERICK ONDIEKI ANDARA ……..……..……..……..…….. 1ST APPELLANT

PETER OYUGI MOKAYA ……..……..……..……..…….. 1ST APPELLANT

AND

STATE ……..…… RESPONDENT

(Being an appeal from original conviction and sentence of the CM's court at Kisii in

Cr. Case No. 7 of 2005 – Hon. A. A. Ingutya, SRM, dated and delivered on 9th June, 2006)

JUDGMENT

The Application

1. The Notice of Motion before court is the one dated 7th February 2012. It is a constitutional reference brought pursuant to **Articles 19 (2), 20 (4) (a), 22 (1), 29 (d)** and**50 (1)** and**(2) (q)**of the**Constitution of Kenya**. The applicant, Rodgers Ondiek Nyakundi in his application seeks the following orders:-

1. That the applicant be admitted to the constitutional division court pending the hearing and determination of this application.

2. That there be a stay of all proceedings thereof and all subsequent orders relating to the disclosed reference criminal case No. 7 of 2005 at Kisii; Court of Appeal cases 135, 136 and 137 of 2006 at Kisumu and Court of Appeal case No. 353 of 2009 pending the hearing and determination of this application.

3. That the court issues permanent acquittal orders as lasting solution well provided in the Constitution of Kenya in favour of the applicant and the same be confirmed upon determination of this application.

2. The application is premised on the following general grounds:-

*i) That the applicant was charged with two counts of robbery with violence contrary to **section 296 (2),** rape contrary to **section 140** and indecent assault contrary to **section 144 (1)** of the **Penal Code**.*

ii) The circumstances surrounding the case were exaggerated by the prosecution witnesses who lied.

iii) The trial court failed to disclose under what section from the three quoted charges the applicant was convicted.

iv) That the applicant made an appeal but the court of appeal adopted the judgment of the trial court without evaluating previous proceedings denying him justice.

v) *The applicant's fundamental rights and freedoms have been violated.*

3. The application is further supported by the affidavit of the applicant sworn on the 7th February 2012 in which he states that he was sentenced and convicted by Kisii Chief Magistrate's court in criminal case No. 7 of 2008 and accordingly High Court and Court of Appeal adopted the same conviction and sentence. He was afraid to file a further appeal at the Supreme Court on grounds that the said court would adopt the same verdict. That upon looking at the proceedings which he has annexed and marked as **R.O.N.1** he discovered that his constitutional rights had been infringed and violated and the charge sheet was a frame up.

The Prosecution Case

4. The prosecution case against the applicant was that the complainant James Omollo Ager (PW1) and his wife Pacificah Osebe (PW3) were going home at about 7.00 p.m. on the 26th day of December 2004 when they were confronted by three people among them the applicant. The applicant and his accomplices interrogated both PW1 and PW3 as to where they were coming from at that hour. In the process of interrogation PW1 lost his national identity card and Kshs.3000/= to the interrogators. He was also whipped and threatened with death. PW1 managed to escape. PW3 was not so lucky. She was led to a maize plantation where she was sexually molested up to the time she was rescued by PW1 in the wee hours of the morning. Thereafter the applicant and his accomplices were arrested and charged in the first count with robbery with violence contrary to **section 296 (2)** of the **Penal Code**; in count II, with the offence of rape contrary to **section 140** of the **Penal Code** and in count III with indecent assault contrary to **section 144 (1)** of the **Penal Code**. All the 3 offences were said to have been committed on the 26th day of December 2004 at Machabi area, Riana Location in Kisii District within Nyanza Province.

5. After the trial before the SRM, Hon. A.A. Ingutya, at Kisii, the applicant and his accomplices were found guilty as charged and convicted of the offence of robbery with violence and sentenced to death. They were acquitted on counts II and III. After the conviction, all the three filed appeals to the High Court. The High Court, after carefully reconsidering and evaluating all the evidence afresh reached the conclusion that the appeals lacked merit and accordingly dismissed the same.

6. Being dissatisfied with the judgment of the High Court which confirmed the judgment of the trial court, the applicant and his co-accused preferred an appeal to the Court of Appeal at Kisumu. The appeal to the Court of Appeal being CR.A. No.353 of 2009, was also dismissed.

7. The applicant and his co-accused were convicted on the basis of the evidence of PW1 and PW3. PW1 stated that at the material time, he was heading home from the shops at Nyamira. He was together with his wife, PW3. The two met three young men whom PW1 knew by

both appearance and name. After PW1 greeted the three young men, among them the applicant, they asked him, **"umetoka wapi saa hii" (where have you come from at this time)**. He told them that he was coming from the shops and was going home. They then asked him why he was with his wife at night and told him that they would take his wife and whatever else he had. They took his national identity card

and Kshs.3000/=. PW1 told the court both in examination in chief and in cross examination that both the applicant and his two co-accused were well known to him.

8. PW3, who was wife to PW1, confirmed the testimony given by PW1. She also said she had previously known the applicant and his accomplices. She added that the night was moonlit. The report of the robbery was reported to Zebedeo Dojo Nyandieko who testified as PW5. According to PW5, PW1 gave the names of the three young men when he made the report of the incident. After receiving the report, PW5 set into motion the machinery for the arrest of the applicant and his co-accused and the three were subsequently arrested.

The Applicant's case

9. The applicant did not deny that he was arrested by the Chief, nor did he deny that he was previously known to both PW1 and PW3. He stated that he was arrested from his home on the 27th December 2004 at about 7.30 a.m. by a village elder.

10. At the hearing of this application the applicant asked the court to order that his case starts de novo. He does not give any reason why he wants his case to start afresh save for the grounds upon which his application is premised. He contended that the circumstances surrounding the case against him were exaggerated and further that the judges who heard his appeals were not serious with what they were doing. He also cited **Articles 23, 50** and **165**of the **Constitution**as the reason for wanting to have his case start afresh.

The Respondent's Response

11. Senior Principal State Counsel, Mr. Mutuku submitted that the applicant's Notice of Motion does not raise any constitutional issue worth considering. That there is no evidence placed before this court to suggest that there was violation of the applicant's human rights. Counsel also submitted that the applicant's conviction was confirmed by two separate appellate courts before which the applicant's grounds of appeal were similar in content to the grounds supporting the instant

Notice of Motion. Counsel urged the court to dismiss the Notice of Motion.

Issues for Determination

12. After hearing both parties in this matter, the following issues arise for determination:-

(a) Whether the applicant has raised any constitutional issues for determination by this court and

(b) Whether, in the circumstances of this case, the applicant is entitled to relief under the relevant provisions of the Bill of Rights, namely Articles 23 and 50 (6) of the Constitution.

Applicability of the Constitution

13. The Constitution of Kenya 2010 was promulgated on 27th August 2010 and pursuant to **Article 263** thereof, the **Constitution** took effect on the date of promulgation. On that date too, the old constitution stood repealed, only subject to the Sixth Schedule. The question that arises for determination here is whether, in light of **Articles 263** and **264**of the **Constitution 2010**, the Constitution operates retrospectively. This question has been determined in a number of recently decided cases namely **Joseph Ihugo Mwaura –vs- Attorney General, Nairobi Petition NO. 498 of 2009**(unreported), **John Githinji Wan'ondu & others –vs- Coffee Board of Kenya & another, Nairobi Petition NO. 255 of 2011**(unreported) and **Di Plessis & others –vs- Du Klerk & another (CCT8/95 [1996] ZACC 10)** as cited with approval in **Wilson Thirimba Mwangi –vs- DPP, Nairobi JR Misc. Application NO. 271 of 2011**. It was held in the above cited cases that the effect of **Articles 263** and**264**is that the Constitution is not to operate retrospectively and that whatever was legal under the old constitution cannot be invalidated, save where it is otherwise expressly provided, by the new Constitution. See also **Charo**

Karisa Thoya –vs- Republic, Court of Appeal at Mombasa, Criminal Appeal No. 274 of 2002 (unreported).

14. In the **Thoya case** (above) the issue was whether the appellant was entitled to legal representation from the state as provided for under **Article 50(1)**of the **Constitution of Kenya, 2010**. The Court of Appeal held that **Article 50 (1)** could not apply retrospectively in favour of the appellant who was charged, tried, convicted and sentenced under the old order. That the correct position is that what prevailed under the old Constitutional order remains to be determined under the said order and not under the new order brought about by the promulgation of the Constitution of Kenya, 2010 on the 27th August 2010.

Is the Applicant herein entitled to a new trial?

15. The applicant's single prayer when he stood up to address the court at the hearing of his Notice of Motion was that he wants his case to start afresh pursuant to **Articles 23, 50** and **165** of the **Constitution**. In effect, the applicant is seeking to enforce a fundamental right that is enshrined in **Article 50 (6)** which provides:-

"50 (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 the appeal; and

(b) new and compelling evidence has become available."

16. Thus, for a new trial to be ordered under **Article 50 (6)** of the **Constitution**, the applicant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available.

17. In the instant case, the applicant has urged for a new trial on the ground that the Constitution of Kenya 2010 grants him the right to do so and secondly that his appeal to the Court of Appeal was dismissed. He also contends that he has not appealed to the Supreme Court because he is afraid that that court will come up with a decision similar to the decision already reached by the other appellate courts that have heard his appeal.

18. The more critical issue for this court to determine is: what constitutes **"new and compelling evidence"**as envisaged by **Article 50 (6) (b)**of the **Constitution?** In the **Wilson Thirimba Mwangi case**(supra) the court observed that there is no definition of the phrase **"new and compelling evidence"** in the constitution, but that **"a person who is convicted has gone through the legally established process with the necessary protections contemplated under Article 50"**and that **"a Petitioner" seeking a new trial moves the court without the presumption of innocence and the burden to upset a lawful decision of the trial and appellate court is squarely on the Petitioner's shoulders."**

19. There is no doubt that the applicant herein was entitled to appeal or review of his case by a higher court upon his conviction by the trial court. That right was exercised when he appealed to the High Court where his appeal was heard by a 2-Judge Bench. The appeal was dismissed. His second appeal to the Court of Appeal was also dismissed. Having gone through the appeal process to the Court of Appeal, the applicant now wants a new trial ordered as provided by **Article 50 (6)** of the **Constitution**. Until the **Constitution of Kenya 2010** was promulgated, the right to a new trial for a convict who had gone through the full cycle of appeals was non-existent. I agree with the Court in the **Wilson Thirimba Mwangi case** (above) when it said that **"Article 50 (6) seeks to balance the public interest in having finality in criminal cases on the one hand and ensuring that where there is new and compelling evidence, an innocent person should not suffer the penalty of a conviction."** That truly is the essence of the provisions of **Article 50 (6)** of the **Constitution**.

20. The applicant in this case did no more than simply state that because the Constitution now makes provision for a new trial, then he should be allowed to start his case all over again because his constitutional human rights were violated and because the judges who heard his two appeals did not, in his view, do a good job.

21. The question that comes up in the mind of this court at this stage is what constitutes new and compelling evidence? Under the CPR, and in particular **Order 44** thereof, a party is entitled to apply for review in the event that there is **"--- discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed ---."**

22. Such a situation requiring the court to define what constitutes new and compelling evidence and the need to exercise caution arose in the case of **D.J. Lowe & Company Ltd. –vs- Banque Indosuez – Civil Applic. Nairobi NO.217 of 1998** before the Court of Appeal (unreported) where the court gave the basis for caution by courts when considering applications for review based on discovery of fresh evidence. The Court expressed itself thus:-

"Where such a review application is based on fact of the discovery of

fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

23. A similar situation arose before the Court of Appeal in the case of **Rose Kaiza –vs- Angelo Mpanju Kaiza – Mombasa Court of Appeal Civil Appeal No.225 of 2008**(unreported). The court expressed the need for caution in the following words:-

"Applications on this ground must be treated with great caution ---

Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

Also see **Mzee Wanjie & 93 others –vs- A.K. Sakwa & 3 others [1982-88] 1 KAR 465**. In that case, Chesoni, Ag JAenunciated the principles to be followed by a court before which an application for review is made. The following are the principles:-

a) The applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial;

b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

24. The right for review as provided under **Article 50 (6)** of the **Constitution**has its historical basis under common law doctrine of error of **coram nobis**. Thus, a defendant who was dissatisfied with the result of his case was entitled to petition the appellate court for review on the ground that there were facts that were unknown to him at the time of the trial and that if these facts had been known, they would have changed the outcome of the case. If the applicant persuaded the court to grant a new trial on the basis of

those new facts, the judge would then determine the case afresh. **Article 50 (6)** of the **Constitution**is premised on that doctrine and represents a big paradigm shift from the old constitution which did not allow for such an opportunity to an applicant who discovered new facts after he had been tried and convicted.

25. In effect, the writ of **coram nobis**was available for curing an error of fact not apparent on the face of the record and for which the applicant could not be held accountable. As seen from the **Mzee Wanjie case**(above) the writ was not available where an applicant would eventually take advantage of the alleged error at the trial, such as where the facts complained of were known before or at the trial or where the applicant alleges that his counsel knew of the existence of the facts but failed to present the same. See generally the **Rose Kaiza case** (above) and **Edward N. Robinson, the Writs of Error Coram Nobisu and Coram Vobis, 2 Duke Bar Journal, 29-37 [1951]** and **Dobie –vs- Commonwealth of Virgina 198 Va. 762, 96 S.E. 2d 747 [1957]**cited by the court in the **Wilson Thirimba Mwangi case** (above).

26. What comes out from the above cited cases is that the court before which an application seeking to re-open a case is made, must exercise great caution when dealing with such an application. As seen from the provisions of the CPR, a civil court dealing with such an application will only grant the prayer if it is clear that new and important evidence which was not available to the applicant at the time of trial despite diligent efforts is now available. The bottom line is that the courts must be extremely cautious when presented with such applications.

27. For similar applications in criminal matters, the case of **Mohamed Abdulrahiman Said & another – vs- Republic, Mombasa Cr. Misc. Application NOs.66 A and 66 B of 2001**(unreported), a case cited with approval in the **Wislon Thirimba Mwangi case** (above), is relevant the 2 Judge comprising Odero and Nzioka JJ considered the meaning of **"new and compelling evidence"** as envisaged by **Article 50 (6) (b)**. The learned judges took the ordinary meaning of the word **"new"** from the Concise Oxford Dictionary 9th Edition and stated: "**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."** The learned judges went on to say,**"In our understanding therefore, "new" evidence must mean evidence that is recent in origin, has been recently discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals."** As regards the meaning of compelling evidence, the learned judges stated: **"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 the evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision.

28. In **BLACKS LAW DICTIONARY Eighth Edition**, the word **"new"** as relates to the context of the application before me is defined as **adj. (of a person, animal or thing) recently come into being; 2.(of anything) recently discovered"** while the word **"compelling"** which is derived from the verb to compel" means **"to come or bring about by force, threats or overwhelming pressure."** In other words new and compelling evidence is evidence that is being seen for the very first time and it must be overwhelming evidence.

29. The above are the principles to be applied to this application. It is also the law in this case that the burden of satisfying the conditions of **Article 50 (6)** of the **Constitution**lies squarely on the shoulders of the applicant herein. The applicant must therefore show this court that:-

a) There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at the trial or that the evidence was not available at the time of the hearing of the two appeals.

b) The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the applicant but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.

30. In the instant case, the applicant has alleged in ground (vii) in support of the Notice of Motion that **"the applicant's fundamental freedoms is violated as no specific date is made out of three counts when he can be a free man found as such, the sentence and conviction pronounced to him is statement" (sic)**. The applicant is among many other convicted persons who have come to court seeking new trials on grounds that their fundamental rights under the constitution were violated. The applicant also alleges that there was no seriousness on the part of the judges of appeal of the High Court and the Court of Appeal when the said courts dealt with his appeals. It was held in **Chikolingo –vs- Attorney General of Trindad and Tobago [1981] 1 All CR 244**, a case that was cited with approval in the **Wilson Thirimba Mwangi case** (above) that **"In the first place, no human right or fundamental freedom --- is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a persons serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to, then none can say there was an error –"**

31. Recently, the above reasoning was adopted by the Court of Appeal in the case of **Methodist Church in Kenya Trustees Registered & another –vs- Rev. Jeremiah Muku & another, Court of Appeal Civil appeal No.233 of 2008** (unreported). The Court of Appeal said:- **"As the privy council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review."**

32. In the instant case, the applicant appealed against both conviction and sentence, not just once but twice and in both instances, his appeals were dismissed. As stated by the court in the **Wilson Thirimba Mwangi case**(above) this application **"cannot be used as an alternative forum to lodge collateral attacks against decisions of the appellate courts nor can it be used as a general substitute for the normal procedures in the court system which are clearly provided for under Article 50 of the Constitution."**

33. It is now well settled that a Petition (or application as in this case) under **Article 50 (6)** is not a retrial or an appeal, and that the court to which such a petition or application is made has **"no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal."** The only duty that this court has to fulfill is to see whether there is any new and compelling evidence to warrant an order for retrial. The applicant's desire in this case is that the case be heard afresh so that all the evidence is placed before the court, including specimen evidence, though he does not specify what that evidence is. 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 also have made such an application to the Court of Appeal. He did not do so. The door was closed and this court has no power to re-open it.

34. In any event, unlike the other cases referred to in this judgment where the petitioners presented the **"new and compelling evidence"** for consideration by the court, the applicant herein has placed no such evidence before this court, so that the court has had no opportunity to test the evidence to confirm whether the same is new and compelling. The applicant has not even indicated what evidence is meant by **"all the evidence"** that is to be placed before the court during the fresh trial; and whether such evidence would pass the test of new and compelling evidence as provided by **Article 50 (6)** so as to warrant the ordering of a new trial.

Conclusion

35. In light of all the above, I find and hold that the applicant herein has not met the conditions of **Article 50 (6)** of the **Constitution** to warrant the grant of the orders sought vide his Notice of Motion dated 7th February 2012. The motion is accordingly dismissed with no order as to costs. This judgment applies, *mutatis mutandis* to **Criminal Appeal Numbers 136** and**137**of**2006**.

36. It is so ordered.

Dated and delivered at Kisii this 31st day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for Appellants

Mr. Mutai (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.