REPUBLIC OF KENYA

High Court at Kakamega

Criminal Miscellaneous Application 15 of 2012

(An application for a retrial vide Article 50 (6) of the Constitution of Kenya)

PHILIP NZAVULI KISAVI ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

R U L I N G

The applicant, **PHILIP NZAMULI KISAVI** was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death in count I.

The applicant was sentenced as follows in the other counts:-

Count II – Assault causing actual bodily harm contrary to Section 251 of the Penal Code and sentenced to one year imprisonment.

Count III – Assault causing actual bodily harm contrary to section 251of the Penal Code and sentenced to one year imprisonment.

Count IV – possessing a firearm without a firearm certificate contrary to section 4(1) as read with section 4 (3) (a) of the firearms Act and sentenced to ten (10) years imprisonment.

Count V – possessing ammunition contrary to section 4 (1) as read with section 4 (3) (a) of the firearms Act and sentenced to five (5) years imprisonment.

The sentences in count II – V were held in abeyance due to the sentence of death in count I.

His appeal to the High Court was dismissed on 5.11.2008.

The applicant subsequently applied for a retrial vide the Notice of Motion dated 23.1.12 under article 50 (6) (a) and (b) and article 165 and 25 (c) of the Constitution.

The grounds upon which the application is based are that his appeal was dismissed by the High Court. He stated he did not have an advocate when his case was heard. It was further added that there was new and compelling evidence in that the Prosecution witnesses who testified during the trial had been compromised by his business rivals.

Ms Ngovi for the State objected to the application and submitted that no strong issues had arisen for a

retrial to be held. She further submitted that the court of Appeal is yet to hear the applicant's appeal.

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."

Article 165 of the Constitution sets out the jurisdiction of the High Court.

The appellants appeal has not been dismissed by the highest court to which he is entitled to appeal. If the applicant did not appeal within the time allowed for appeal, he has not demonstrated that his application to appeal out of time has not been successful. There is also no new and compelling evidence that has become available. The issue of calling of defence witnesses and lack of advocate were matters that fell within the ambit of the first appeal.

In addition to the Constitution, I have considered the Principles to be applied when considering whether or not to order a retrial as re-stated by the Court of Appeal in the case of BERNARD **LOLIMO EKIMAT VS R. CA NO.151 OF 2004 (ELDORET).**

"There are many decisions on the question of what appropriate case would attract an order of retrial, but on the main the principle that has been acceptable to court is that the case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice required it."

In the instant case, after considering the issues raised by the applicant, I have not seen any procedural irregularities that go to the core of the matter and can be said to have occasioned a miscarriage of justice.

The application has no merits and is dismissed.

Delivered, dated and signed at Kakamega this 19th day of December, 2012

B. THURANIRA JADEN

J U D G E