



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 23 of 2012

IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

BETWEEN

RICHARD KITUM YEGO APPLICANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Petition is brought under Article 50 (6) (a) of the Constitution. The Petitioner Richard Kitum Yego prays that this Court orders for a retrial in a case that has failed in two appeals, that is in the High Court and the Court of Appeal.

The trial began at Chief Magistrate's Court in Eldoret vide **ELDORET CHIEF MAGISTRATE'S CRIMINAL CASE NO. 5801 OF 2000 – RICHARD K. YEGO -VS- REPUBLIC**. He was convicted and sentenced to death on 21st November 2001. Being dissatisfied with the Judgment of the trial Court, he filed an appeal in the High Court vide **ELDORET HIGH COURT CRIMINAL APPEAL NO. 147 OF 2001 – RICHARD K. YEGO -VS- REPUBLIC**. The appeal was dismissed, convictions in the three counts upheld as well as the sentences imposed. The Judgment of the High Court was delivered on 22nd April 2004.

The Petitioner was again dissatisfied with the findings of the High Court and he appealed in the Court of Appeal vide **ELDORET CRIMINAL APPEAL NO. 205 OF 2005 - RICHARD KITUM YEGO -VS- REPUBLIC**. The Court of Appeal dismissed the appeal against the convictions in the three counts. The Judges upheld the sentences imposed on the first count but held in abeyance sentences in second and third counts.

He has raised several grounds on which he thinks a re-trial should be ordered. In brief they include:-

(a) That he was not properly identified as the person who committed the offence and in any event, no identification parade was carried out.

- (b) That Court relied on evidence of recognition as opposed to identification which was flawed.
- (c) The doctrine of recent possession was not properly applied by the Court.
- (d) The evidence of a confession was improperly admitted by the trial Court, as the Court did not adhere to the provisions of rules 4 and 5 of the Judges Rules and Section 48 of the Evidence Act.
- (e) The trial within a trial was a nullity as provisions of Section 211 of the Criminal Procedure Code do not provide for it.
- (f) The trial Court gave weight to the prosecution's case, yet not all witnesses were called to testify. That in such an event Court should have drawn an adverse presumption against the prosecution's failure to call some key witnesses.

This petition is further supported by the Petitioner's affidavit sworn on 24th February 2012.

Counsel appearing for the Petitioner only reiterated what is contained in both the petition and the supporting affidavit.

The State Counsel, Mr. Wainaina vehemently opposed the petition stating that the issues raised and reasons cited as to why a re-trial should be ordered were all canvassed in the trial Court and in both first and second appellate courts.

Article 50 (6) (a) of the Constitution provides:-

“(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if:-

(a) The persons 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.

Article 50 (6) (b) provides:-

“(b) and new and compelling evidence has become available.”

Sub-article 6 (a) must be interpreted vis-a-vis the provisions of sub-article 6 (b). The latter provides for circumstances under which a re-trial may be ordered. In this regard the Court must address itself as to whether new and compelling reasons have arisen since the Judgment of the second Appellant Court.

I have read the judgments of the three Courts which presided over the trial and the appeals respectively. All the issues raised in this petition were carefully addressed. Before it arrived at its verdict, trial Court considered the Petitioner had been properly identified, some of the deceased's stolen items were recovered from his house and others from his person as he wore them. The trial Court also admitted the confession statement after a trial within a trial was conducted and it was noted that no rules were violated when the confession was recorded.

The grounds of appeal which the Petitioner raised in the High Court are as contained in the Petition. The included; that the exhibits produced were not found in his house or on him, that he was not positively identified, that the Magistrate wrongly relied on a retracted charge and caution statement, that the conviction was against the weight of evidence and that the Magistrate did not give weight to the Petitioner's defence. I have read the Judgment of the High Court written by two Judges and delivered on 22nd April, 2004. The Judges analysed and gave regard to each of the grounds raised against the weight of evidence and findings of the trial Magistrate. Their reasoned Judgment upheld the conviction and sentence handed to the Petitioner in the lower Court.

In the second appellate Court three issues were raised for determination; that is, identification, confession

and recent possession. Again, this Court gave careful consideration to each and every issue against the submission of the then Counsel for the Petitioner, Mr. Omboto and arrived at the verdict that the appeal lacked in merit and was dismissed. I have noted that each of the points the Honourable Judges of the Court of Appeal considered were so considered against decided case(s). On identification it relied on **ANJONONI & OTHERS -VS- REPUBLIC (1980) KLR, 54**; confession - **TUWAMOI -VS- UGANDA (1967) EA, 84**, **KINYUA -VS- REPUBLIC (2003) KLR 294** and **THIONGO -VS- REPUBLIC (2004) 2 KLR 38** and on recent possession – **ABDUL DEBANO BOYE & ANOTHER - VS- REPUBLIC CRIMMINAL APPEAL NO. 19 OF 2001 (unreported)**.

I have said it here before that the petition reiterates the same issues and grounds which the trial and appellate Courts dealt with. Nothing new has arisen after the Judgment of the Court of Appeal. Suffice it to say I am careful not to analyse the merits of the findings of the three Court vis a vis any cited cases because, if I did so I would be sitting on appeal against the Judgment of the Court of Appeal yet the Petitioner contends that the Courts failed to give weight to the grounds of appeal he raised in all the Courts. To the contrary, record shows that each of the Courts considered the grounds carefully before coming up with the verdict they did. So if the Petitioner strongly feels that more weight ought to have been given to those issues, my view is that all is not lost. Article 50 (6) (a) which provides for a re-trial also gives an aggrieved party the right to appeal to the highest Court. Currently, our highest Court is the Supreme Court to which the Petitioner can fall back to.

Lastly, it is in line with judicial procedures for the High Court to supervise the work of the subordinate Courts. However the supervisory powers must be exercised judiciously and within the law. I find myself without such power at this point to order for a re-trial on grounds that the whole of the criminal trial against the Petitioner was not given due emphasis of the law as the contrary has been demonstrated. In the same vein I find that no fundamental rights of the Petitioner were violated throughout the trial and in the appeals and so nothing necessitates this Court to order for a re-trial.

In the result I agree with the State Counsel that this is not a suitable case to order a re-trial. I dismiss the Petition as lacking in merit.

DATED and DELIVERED at ELDORET this 19th day of December, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

Mr. Barasa for the Applicant

No appearance for the Respondent