



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

MISC. APPLICATION NO. 55 OF 2011

SIMON GITHU MBUGUA.....
APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Sections 21(1), 23(1) and 50 (6)(a) & (b) of the Constitution of Kenya provide as follows -

"S.21(1) It is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights, and

Section 23(1) says -

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.

And Section 50(6)(a) & (b) says -

"50(1) - 5

(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.

(b) new and compelling evidence has become available.

The applicant herein says in Chamber Summons, that his rights to a fair trial were denied to him initially, that he has new and very compelling evidence if the application is found meritorious, and that he wishes to be present at the hearing of the application.

In ordinary appeals under the Criminal Procedure Code, a retrial will be ordered when the original trial was illegal or defective. A retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of filling gaps in the evidence in the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered.

Each case must depend on its own facts and circumstances and an order for re-trial should only be made where the interests of justice require it.

The Constitution has created a new phenomenon. It has granted enormous privileges not only to the accused but also convicted felons. The latter now have, in a manner of speech, a second bite of the cherry.

The convicted felon has the same rights to institute court proceedings as an ordinary free citizen, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. For the felon however his right is circumscribed by Section 50(6) (b) that new and compelling evidence has become available.

Whereas subsection 6(a) allows a felon to appeal out of time, and this has been routinely allowed by the courts an appeal under subsection 50(6) (b) is in the nature of a review by the High Court not only of the evidence first before the trial court, but also of its own decisions as the first appellate court. The High Court will have no jurisdiction to review the decision of the Court of Appeal or the Supreme Court.

For the felon to exercise the right of review, it is not enough to allege, as the applicant has done in this application, that he was denied the rights of a fair hearing at the trial, he must also demonstrate in his application, a prima facie case, how these rights were denied. The applicant must also demonstrate the new and compelling evidence that shows he was wrongly convicted and sentenced.

As it is the applicant who is alleging the existence of such new and compelling evidence the onus is on him to state in his application the nature of such compelling evidence. He who alleges the existence of particular facts must prove those facts (*S.107 of the Evidence Act, Cap. 80, Laws of Kenya*).

If this is not done, I think not only the courts, but the entire judicial system, the investigation, the prosecution and the prison system will be mandated with pleas for review. In addition whereas the right to appeal out of time is open-ended because of delays in production of records, there is need to curb the time within which these rights may be exercised. The Constitution of Kenya (*Supervisory and Protection of Fundamental Rights and Freedoms*), High Court Practice Rules, 2006 (*the Gicheru Rules*) need to be examined afresh, and revised to take into account the provisions of the new Constitution of Kenya.

In the circumstances, I must say that there is no material before me upon which I can give the Applicant a right of hearing at this stage.

The summons filed in this court on 19th May 2011 is therefore summarily struck out.

Dated, delivered and signed at Nakuru this 31st day of May 2011

M. J. ANYARA EMUKULE
JUDGE