REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. APPLICATION 46 OF 2010

(HCR NO.46 OF 2010 CONS. WITH HCR 47 OF 2010)

RAPHAEL GURU MAINA
GEORGE NGANGA
MAINA…….....APPLICANTS

-VERSUS-

REPUBLIC…….....RESPONDENT

RULING

The Notice of motion which were undated, are filed by **RAPHAEL GURU MAINA** and **GEORGE NGANGA MAINA** under section 22 (1) of the Constitution of Kenya in which they seek the orders that their case be "repealed" on the basis of section 50 (6) of the promulgated constitution of 2010 because they are able to avail new evidence including the Ob and the first report.

The same is supported by affidavits sworn by the applicants whose contents are replicate of each other. They deponed that they were convicted and sentenced to suffer death on 4th July 2007 on a charge of murder contrary to section 203 as read with section 264 of the Penal Code before Hon Justice W.Ouko at the Malindi High Court in Criminal Case No. 6 of 2006. They appealed to the Court of Appeal, and the same was dismissed on 31st July 2009. They now wish to offer new evidence based on the fact that their appeals were dismissed due to lack of an OB and first report and so it is desirable that this case be revived.

The application is opposed by Mr Kemo for the State, who has raised a preliminary objection saying that Article 261 (1) of the Constitution provides that Legislation governing Chapter 4, and specifically Article 50, shall have legislation enacted to govern the implementation and usually there are certain time limits set within which legislation should be made. He argues that this right has not yet crystallized and the petitioners have not even disclosed the nature of evidence which would be required to enable the court a fresh trial after the appeal had been dismissed. It is his view that the application is premature and should wait legislation.

The Petitioners response is that their prayers are made under Article 50 (6) of the Constitution which came into operation in August 2010 and the Bill of Rights gives them the right to make this application because their rights have be infringed. They urged this Court to consider the provisions of Article 23 (1) and find that their petition is properly before court, as jurisdiction is properly conferred by Article 165 of the Constitution.

The crux of the petition is that the court should order for a fresh trial as petitioners have new evidence and the constitution is already in operation, so there is nothing to wait for legislation and the preliminary objection should be dismissed.

Article 22 (1) of the Constitution provides;-

'Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been deemed, violated or infringed or is threatened".

The authority of the High Court to uphold and enforce the Bill of Rights is enshrined in Article 23 (1) of the Constitution. The petitioners wish to have their case heard afresh, on the basis that Article 50 (6) of the Constitution provides;-

"A person who is convicted of a criminal offence may petition the High Court for 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.

(b) New and compelling evidence has become available whereas these provisions are very clear and are the basis of the petitioners desire that the court orders on the provisions of Article 23 (2) of the constitution which provides;-

"Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine application of redress or denial, violation or infringement of or threat a right or fundamental freed in the bill of rights"

Does this provision include the matters filed in the High Court which already has jurisdiction original conferred on it by Article 23 (1) of the Constitution? It is necessary to consider what is deponed as "subordinate courts and why the issue of original jurisdiction has a centre stage in the matter. Part II, of the Interpretation and General Provisions Act (cap 2) at section 3 (1) Provides interpretation of terms – and "subordinate court" means a Magistrate`s Court within the meaning of the Magistrate Court`s Act, and a reference to a subordinate Court of a particular class, means a Magistrate`s Court of that class within the meaning of that Act "This definition does not include the High Court which is defined as followed;-

"High Court" means the High Court established by the Constitution"

Chapter Ten part 2 of the 2010 Constitution provides for the Judicial authority and legal system. Part 2 specifically sets out which are the "SUPERIOR COURTS" and these are shown as (1) The Supreme Court under Article 164 and (2) The High Court, under Article 165.
My finding is that Article 23 (2) does not restrain this court from hearing the petition, as such jurisdiction has already been conferred by Article 23 (1) and the High Court need not want for any other registration. I think the provision under Article 23 (2) stems from the fact that original jurisdiction to hear constitutional matters is vested in the High Court, yet the subordinate courts, which are the point of initial contact for many individuals who come into contact with the Judicial system (and who find themselves in conflict with the law or have had their rights violated while being accused of being in conflict into the law). Yet the process becomes prolonged and delays delivering of justice because the moment they raise the issue of violation of their rights, then the matter has to be referred to the High Court to deal with – and with the current Constitution in place, applications regarding violation of rights are bound to increase and flood the courts – I am persuaded that it is on account of this that Article 23(2) specifically provides that Parliament should enact legislation to enable subordinate courts deal with applications regarding redress or denial/violation of fundamental rights under the Bill of Rights.

The upshot then is that the preliminary objection has no merit and is dismissed. The petition is now listed for hearing on 29th August 2011.

Delivered and dated this 7th day of July 2011 at Malindi

H A OMONDI
JUDGE