**Ombok v Republic (Criminal Petition E004 of 2023)**
**[2023] KEHC 3039 (KLR) (5 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3039 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CRIMINAL PETITION E004 OF 2023**

**RE ABURILI, J**

**APRIL 5, 2023**

**IN THE MATTER OF ARTICLES 22 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 25(C), 27, 28 & 50 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**MOSES OMONDI OMBOK ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. By a petition filed in court on 6/2/2023, the petitioner herein Moses Omondi Ombok seeks the following reliefs:

    a. The honourable court makes a declaration that the petitioner suffered double jeopardy by being charged with 2 distinct offences yet based on the same acts and emanating from the same police OB number.

    b. The court makes a declaration that the petitioner's rights to a fair trial were violated.

    c. A the court grants an order that the high court miscellaneous application number 7 of 2019 at Siaya, high court criminal case No 22 of 2015 at Siaya and judgment of high court criminal appeal No 12 in consolidation with appeal 9,

10 and 11 of 2018 at Siaya respectively be produced when this matter is being heard and determined for the applicant's sake.

d. The court makes a declaration that the petitioner's rights to liberty was violated and continues to be violated.

e. The court grants orders that the petitioner be acquitted as a remedy to the violation of his rights and fundamental freedoms.

2. The petitioner avers that he was initially charged with the offence of murder vide Kisumu High Court Criminal Case No 39 of 2011 arising from Bondo Police Station vide OB No 38/21/06/2011. That the criminal case was subsequently transferred to Siaya High Court in the year 2015 and assigned Criminal Case number 22 of 2015 from where a nolle prosequi was entered by the respondent through the DPP in November, 2015 and accepted by the High Court in June, 2016.

3. That after the entry of the nolle Prosequi, the petitioner remained in custody until he was produced in Bondo Law Courts on June 27, 2016 and charged vide Criminal Case No 729 of 2016 with the offence of robbery with violence arising out of OB No 38/21/06/2011. That upon conclusion of the trial, the petitioner was convicted on two counts and sentenced to serve 50 years imprisonment on each count.

4. The petitioner laments that upon conviction, he appealed to the High Court vide Siaya High Court Criminal Appeal No 12 of 2018 (consolidated with Criminal Appeal Nos. 9, 10 and 11 of 2018). That the appeal was dismissed despite having all through the trial made several applications to be supplied with the OB extract No 38/21/06/2011 of Bondo Police Station.

5. The petitioner avers that he made an appeal via High Court Miscellaneous Application No 7 of 2019, to be supplied with extract of OB No 38/21/06/2011 and 3/22/06/2011 all of Bondo Police Station in vain.

6. He states that he has now obtained copies of the extract No OB 38/21/06/2011 through private means which shows that the offence of robbery with violence that he was charged of and convicted was not reported and that he has therefore been held in custody illegally and his liberty as guaranteed by Article 29 of the *Constitution* violated.

7. He further avers that he does not wish to prefer an appeal to the Court of Appeal before exhausting his rights under Article 22 of the *Constitution* and relies on the case of *Protus Buliba Shikuku v Attorney General* [2012] eKLR.

8. The parties appeared before me on 15/2/2023 and argued their respective positions orally. The petitioner submitted and reiterated the grounds of the petition and added that he got the OB No 38/21/6/2011 for Bondo Police Station showing that the report made was that of murder yet he was charged with robbery with violence. That the report shows that there were 3 assailants who vanished into darkness and does not know how he was arrested in connection with the offence. He thus invites this Court to consider the OB and the ruling in Misc. Application No 7 of 2018 whether he was supposed to be charged and with which offence.

9. The petitioner submitted that the nolle prosequi was entered against him in his absence as he was in custody. He terms the sentence imposed unlawful as he did not know how the incident took place and only obtained the OB through the prison authorities. The contents of the OB extracts No 38/21/6/2011 and 3/22/6/2011 were read out to this Court by the petitioner during his submissions, showing that the offence reported was of murder.

10. The petitioner argued that from the extracts as read out to court, two issues arise firstly, that the report gave no names of the killers, their clothing and or appearance which information was withheld until the hearing which information,if it had been availed at the time, it is unlikely that the conviction would have been upheld. He deems the evidence as new and compelling. He argues that the issue was not evaluated and if this Court evaluates it, it will find that the conviction cannot be sustained.

11. The petitioner relied on the cases of *Nyongesa Sirengo Makokha v Republic* Busia High Court Petition No 5/2016, *Rodgers Ondiek Ondiek v Republic* [2012 ] eKLR *Emily Otieno Odhiambo v Republic* [2012])eKLR and *Waita Wanyoki v Republic* [2018] eKLR.

12. Opposing the petition, Miss Mumu Senior Principal Prosecution Counsel for the Respondent State submitted that indeed, the petitioner was charged with the offence of murder and that a nolle prosequi was entered. That he was subsequently re arrested and together with others, they were jointly charged with the offence of robber with violence. That the trial was concluded expeditiously and the petitioner was accorded a chance to cross examine the witnesses. She termed the sentence imposed as lenient in the circumstances. She submitted that the witnesses identified the petitioner and the prosecution did not raise any new evidence and that despite the fact that the OB extract was not availed, the petitioner did not file into court the extracts, that the one read out to court by the petitioner made no difference even though she doubted the authenticity of the extracts in possession of the petitioner.

**Analysis and determination**

13. I have carefully considered the petition herein and the submissions for and against the petition.

14. The issue for determination is whether the petition is merited. In summary, it is not in dispute that the petitioner was charged vide Kisumu High Court Criminal Case No 39 of 2011 with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. This was before the High Court was established in Siaya. The case was subsequently transferred to Siaya High Court and allocated file HC Cr Case No 22 of 2015. On 21/6/2016, a nolle prosequi was allowed by the court discontinuing the proceedings against the petitioner and his co accused persons. On that day, the petitioner was not present but his advocate Miss Maureen Jebichii Kibet was present in court.

15. The petitioner alongside Joseph Opiyo Marende, Isaiya Otieno Sumba and John Etyang were then freshly charged with 3 counts of the offence of robbery with violence in Bondo PM's Court Criminal Case No 729 of 2016. In that case, the prosecution called 9 witnesses and the accused persons testified and called no witnesses.

16. After considering the evidence adduced by the prosecution and the defence proffered by the accused persons, the trial court found the accused persons guilty of the offence of robbery with violence and convicted and sentenced them to serve 50 years imprisonment on counts I and III.

17. The accused persons were aggrieved and so they appealed to the High Court at Siaya citing eight grounds of appeal. Upon considering the appeal on its merits, this Court dismissed the appeal in its entirety. The petitioner thus filed this constitutional petition.

18. From the onset, I must state that the petitioner did not produce in this court the extracts of the OB which he read out to court during the hearing hereof and as such, the court did not have the benefit of interrogating the contents of the said OB extracts to confirm their authenticity. As to why the petitioner could claim that he had obtained the OB extracts from the Prison authorities and fail to attach them to his petition and instead choose to only use them for submissions from prison custody as this petition was heard online is only within the knowledge of the petitioner.

19. The petitioner's quest for the production of the OB extracts started while he was on trial for robbery with violence. he petitioned this court vide Misc Criminal Application No 7 of 2019 seeking for production of the said OB extracts and despite orders by this court for the said OB extracts to be produced, the same were never produced hence the court closed the above file.

20. However, upon my perusal of the trial court record in Bondo PM Cr Case No 729 of 2016, I find that the petitioner's complaint in this regard was captured by the trial court's record as follows: PW-8, CIP Javan Onzere when cross-examined by the petitioner stated that:

> " ....I went and recorded the same in the OB. It was OB No 3/22/06/2011 at 0245 hours. I can see OB No 38/21/06/2011 at 2355 hours. It is a repot of murder. It shows the incident occurred at 8.00 pm....."

21. PW9, PC Shadrack Meli on his part when cross examined stated thus:

> " .....you were booked with the offence of murder vide OB No 3/22/16/2011...."

22. I note from the record of the trial court that the OB extracts were not availed and no application by the petitioner is captured in the trial court record save for the Miscellaneous Application alluded to earlier where despite the court having made an order for the production of the said OBs, there was no cooperation from the police and the file was therefore closed.

23. In my analysis therefore, I find that the issue of the Occurrence Book was adequately addressed in the trial court and therefore I find no prejudice was occasioned to the petitioner herein and his co accused for its non-production before this court in the Miscellaneous Criminal Application No 7 of 2019.

24. The issue to be resolved in this petition is whether the availability of the OB extract of its contents as read out to the court by the petitioner amounts to new and compelling evidence and therefore whether the petitioner suffered any double jeopardy as alleged.

25. The defence of double jeopardy is provided for under Article 50(2)(o) of the *Constitution* which provides that:

> " 50 (2) Every accused person has the right to a fair trial, which includes the right—
>
> (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

26. Section 207 of the *Criminal Procedure Code* provides for manner of taking plea. Sub section 5 provides that:

> " If the accused pleads—
>
> (a) that he has been previously convicted or acquitted on the same facts of the same offence; or
>
> (b) ....,
>
> the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

27. In this case, the prosecution entered a nolle prosequi on the charge of murder and the matter thus terminated as provided for under Article 157(6)(c) and (9) of the *Constitution*. In the subsequent trial of robbery with violence, the petitioner did not raise the issue of having been tried and convicted and or acquitted previously of the same offence and only raised it in this petition stating that he had now obtained new and compelling evidence which was not available at the time. The new and compelling evidence is that the OB extract that he read out to court discloses that he was arrested and charged with the offence of murder yet he was also later charged and tried and convicted of the offence of robbery with violence over the same incident or occurrence.

28. The principle of double jeopardy was discussed in *Nicholas Kipsigei Ngetich & 6 others v Republic* [2016] eKLR where Odero J cited the case of *Connelly v DPP* [1964] 2 All ER 401 in which the principle had been stated that:

> "(i) That this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge;
>
> (ii) That on a plea of autrefois acquit convict or autrefois convict a man is not restricted to a comparison between the latter indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;
>
> (iii) That what has to be considered is whether the crime or offence charged in the latter indictment is the same or is in effect or is substantially the same as the crime charged in a former indictment and it is immaterial that that facts under examination or the witnesses being called in the later proceedings are the same as those earlier proceedings;
>
> (iv) That apart from circumstances under which there may be a plea of Robbery with Aggravation. The accused objected to this second trial and pleaded 'autrefois acquit'. The House of Lords in England rejected this plea and held that a plea of 'autrefois acquit' does not protect a person from further prosecution for a different offence on the same facts simply because he had been prosecuted on those facts and acquitted."

29. It is common ground that the petitioner was first charged with the offence of murder before the said charge was terminated and later a charge of robbery with violence and finally he was convicted on the latter charge. I have perused the murder case file and note therein that the nolle prosqui was entered before any of the witnesses for the prosecution had testified. The petitioner too had not tendered his defence.

30. This Court is well aware that an entry of nolle prosequi is not an acquittal but a termination of the prosecution against an accused person as determined by the Director of Public Prosecutions with leave of the Court pursuant to the powers donated on the Office of the Director of Public Prosecutions under Article 157 of the *Constitution*. This therefore means that even if the said Nolle prosequi was entered in the absence of the accused /petitioner herein whose advocate was in court and stated that she was not opposed to the nolle prosequi being entered against her client the etitioner herein, the same did not constitute an acquittal of the petitioner neither is any prejudice demonstrated.

31. The basis of this petition is that the petitioner had since obtained OB extracts which he read out to court although none of those extracts was annexed to the petition for consideration by the court. Nevertheless, as to whether the extracts as tread to court constitute new and compelling evidence, the supreme court in *Tom Martins Kibisu v Republic*, Supreme Court Petition No 3 of 2014 (2014) KLR had this to say concerning new and compelling evidence:

> " Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be 'new and compelling evidence'.
>
> We are in agreement with the Court of Appeal that under Article 50(6), "new evidence" means "evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person."

32. Having stated the meaning of the term new and compelling evidence and considering the petitioner's plea that his rights were violated simply because he was tried and convicted for the offence of robbery with violence after being charged with murder which latter charge was terminated via a nolle prosequi, my finding is that the petitioner upon conviction by the subordinate court preferred an appeal to Siaya High Court vide Criminal Appeal Nos. 9,10,11 and 12 of 2018 (consolidated) which appeal was heard on merit and dismissed.

33. In the circumstances, I find that although the petitioner claims that there is new evidence in the form of OB extracts which he read out to this court during the hearing of this petition, and which was not tendered in court; coupled with the fact that the petitioner had the opportunity to appeal and therefore the opportunity to have the matter of the OB extracts addressed, I find that the petitioner herein has not demonstrated that he has any credible new and compelling evidence to support his petition for vindication of his rights to a fair trial.

34. I further note the petitioner is alleging violation of rights which are constitutionally guaranteed. He claims that he was held in custody unlawfully because of what he calls double jeopardy. However, the trial court records show that he was held in custody under warrant of court. It is a cardinal principle that he who alleges violation of rights bears the duty of clearly establishing how the specific rights were violated as was stated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it was held that:

> " We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High

> Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent..."

35. From the pleadings and submissions herein, I find that the petitioner has not sufficiently established how his rights under Article 50 were violated by the respondent. In any event, the petitioner was accorded the facilities to pursue his appeal upon conviction and the Court on appeal did not find any of his rights to have been violated.

36. For the aforesaid reasons, I find no merit in this petition as a whole which is hereby dismissed.

37. This file is hereby closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH APRIL, 2023**

**R.E. ABURILI**

**JUDGE**