REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC APPL. NO. 237 B OF 2012 PETITION)

PETER ODUOR LUKAS.....PETITIONER.

VERSUS

REPUBLIC.....RESPONDENT.

JUDGMENT

Background

1. The Applicant herein was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. On conclusion of the trial, he was found guilty and sentenced to suffer death. Aggrieved by the decision, he appealed to the High Court. A two judge bench was constituted in which Honorable Justices Dulu and JB Ojwang' dismissed the appeal. The Applicant thereafter filed a further appeal to the Court of Appeal. A three judge bench comprising Honorable Justices Waki, Onyango Otieno and Nyamu heard the matter and dismissed it. In pursuit of justice, the Applicant filed the instant Petition under **Article 50 (6) of the Constitution of Kenya.**

Submissions

2. Applicant appeared in person, the Respondent was represented by the Miss Nyauncho. The Applicant submitted that the magistrate ignored his submission that there was no first report, no accurate date of arrest and that a myriad of contradictions subsisted in the case of the prosecution. He also took issue with the allegation that he was arrested at the scene of the offence whereas no weapons or exhibits were collected and adduced in court. He submitted further that the evidence of the investigating officer, a crucial witness, was not considered. He further submitted that the High Court failed to order the prosecution to avail an Occurrence Book (OB) report that, in his opinion, would have been adverse to the case of the prosecution.

3. He submitted that the court file in the High Court contained submissions of a different person named Marcus Isulu Zakayo. Further, that these said submissions had not been formally filed as they did not contain the requisite stamp. He submitted that this court called for a copy of the Court of Appeal judgment which was never availed but that he was able to present a copy himself. He urged the court to rely on **Norman Ambichi Miero & another v Republic [2012] eKLR** and find that the issues that he raised were valid.

4. The Applicant prayed that the court do exercise its powers to review the death sentence. He urged the court to mete out a more appropriate sentence if it found the application unmeritorious. He asked that the court considers that he had served a period of 16 years in prison. He also informed the court that his parents were since deceased and that his children were school-going and needed his support.

5. The Respondent, represented by Miss Nyauncho, submitted that the issues raised by the Applicant did not constitute new and compelling evidence. As such, they did not meet the criteria iunder **Article 50 (6) of the Constitution of Kenya** that would warrant a retrial. Miss Nyauncho further submitted that the two appellate courts did address themselves to the issues now raised. As well, the Applicant failed to persuade the court that the evidence he relied on could not be obtained despite exercising due diligence.

6. Miss Nyauncho submitted that the evidence presented did not cast doubt on the culpability of the Applicant. In particular, the OB report relied on by the Applicant would not diminish the value of identification. This is because identification was by recognition. She further submitted that the conditions for identification were conducive as observation was in broad daylight.

7. On sentence, Ms Nyauncho submitted that the Applicant robbed the complainant of goods and money whose total value was Kenya Shillings twenty two thousand (Ksh 22,000). He was in the company of others not before the court. The Applicant and his accomplices were armed with clubs, pangas and machetes. Despite this, Miss Nyauncho urged the court to set aside the death sentence and mete out an appropriate sentence. She asked that the court considers that the Applicant robbed the complainant of goods with a value that mitigated against the harshness of a sentence to suffer death. She urged that the court dismisses the application.

8. In rejoinder, the Applicant urged the court to view, with skepticism, the fact that he had been arrested at the scene of crime. This was particularly because none of the weapons allegedly used or goods reported stolen were recovered or obtained. He submitted that the investigating officer, in his testimony, absolved him of any criminal acts or omissions. He urged the court to consider his submissions.

Determination

9. I have accordingly considered the respective rival submissions. I have also versed myself with the original trial court record as well as the judgments of both the High Court and the Court of Appeal. I have deduced that the issues arising for determination are:

a) What the scope of application of Article 50(6) of the Constitution is.

b) Whether the Petition is merited.

Scope of application of Article 50(6) of the Constitution:

10. Article 50(6) of the Constitution states that:

> ***"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."***

11. It is trite that the right to a new trial is only available to a convict where he demonstrates that two conditions have been met. The first is that the Petitioner must prove that his appeal has been dismissed by the highest court to which he is entitled to appeal or he has failed to appeal within the stipulated time allowed to appeal. The Petitioner in this case has appealed the matter all the way to the Court of Appeal which upheld the conviction. While the judicial framework indicates that the apex court is the Supreme Court, I find it instructive that Article 50(6) uses the words "entitled" when stipulating what amounts to the highest court. This is informed by the meaning of the word "entitle" as defined in Black's Law Dictionary, 10th Edition, namely:

> ***"To grant a legal right to or qualify for."***

The definition is buttressed by the meaning of the word in the Concise Oxford Dictionary, 12 Edition, namely:

> ***"Give (someone) a right to do or receive something."***

12. From the foregoing, it is clear that in determining what the highest appellate court is for the purposes of Article 50(6) the consideration the court must have is what court the Petitioner can appeal to **"as of right".** With that in mind, there is no doubt under our judicial system that the highest court with regards to criminal offences is the Court of Appeal.

13. In reaching this conclusion, i find solace in **Section 15(1) of the Supreme Court Act, 2011** which states that:

> ***"Appeals to the Supreme Court shall be heard only with the leave of the court"***

14. That being the case, the Petitioner in the present case meets this first criterion.

15. The second criterion is to proof that "*new and compelling evidence has become available*". The Constitution does not set out a definition of what constitutes "new and compelling evidence". However, there have been deliberations relating to the provision, the leading authority being from the Supreme Court in **Tom Martins Kibisu v. Republic[2014] eKLR**. At paragraph [42] the Court delivered itself thus:

> ***"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 the accused person."***

16. This holding is binding on this court given the rules of precedence. I note that it sets a very high bar to achieve, which in some instances may work against serving the ends of justice. But on the other hand, courts must be alive to the fact that if a high bar is not set, one single litigation of this nature may open a *Pandora's box* where an avalanche of Petitions would be filed, leading the courts unable to cope with the workload. Applying the interpretation of what constitutes new and compelling evidence accorded by the Supreme Court therefore, each case must be considered on its merit with the focus being to serve the interests of justice.

17. With that in mind, my view is that the Petitioner herein, is urging the court to apply a much less threshold than has been set by the Supreme Court. Unfortunately, this court is bound by the principle of *staire decisis* and cannot go against what a court of a higher

jurisdiction than itself has determined with finality.

18. It is the Petitioner's submission that there was no initial report submitted at the trial. In his view, had the initial OB report been provided by the court, there was a likelihood that all the three courts would have arrived at a different verdict on the issue of his identification. On the part of this court, I note that the issue identification was heavily considered by both the High Court and the Court of Appeal and arrived at a finding that the Petitioner was positively identified. The High Court in this Petition cannot therefore adjudicate on it again. It would be tantamount to sitting on an appeal on a decision of courts superior to it. This is not tenable at all. I therefore find that this issue does not qualify as new evidence for the purposes of **Article 50(6) of the Constitution.**

19. This also applies to the submission that the Petitioner was wrongly convicted notwithstanding that the no exhibits were collected from the scene of robbery that linked him to the robbery. Again, the submission was made to all the three courts that heard the Petitioner's case and dismissed it. With the foregoing observation, it follows that this issue not constitute new and compelling evidence under Article 50(6) of the Constitution.

20. In my view though, the Petitioner, may still pursue justice by seeking leave in the Court of Appeal to file a third appeal in the Supreme Court, probably premised on a determination of his positive identification. That Court may then pronounce itself on this aspect that the Petitioner is passionate about. He is entitled to pursuit of justice to the end.

21. He submitted that the High Court relied on proceedings of another Appellant when dealing with his appeal. However, this court is bound by the hierarchy of the courts and cannot make observations or findings on this issue as the same would amount to a gross usurpation of powers of courts superior to it and therefore act *ultra vires* its jurisdiction.

22. In the foregoing, I find that this Petition lacks merit and the same is hereby dismissed with no orders of costs.

23. As regards the sentence, there is no doubt that the Supreme Court having declared the death sentence unconstitutional in the case of **Francis Karioko Muruatetu & Anothers (2017) e KLR,** the Petitioner is entitled to a review of his sentence. The same should however be done by the court that tried him. This will thereafter accord him an opportunity to seek review if dissatisfied with the decision of the trial court. Accordingly, I advise him to open a revision/application file in the Chief Magistrate's Court at Milimani for this purpose. The Deputy Registrar of this court will facilitate the remitting back of the trial court file to the magistrate's court accordingly.

Dated and delivered at Nairobi This 20th Day of May, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Petitioner in Person*

2. *Miss Nyauncho for the Respondent.*