REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CONSTITUTIONAL PETITON NO. 14 OF 2018

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

IN THE MATTER OF ARTICLE 19, 20(2), 22(1), 25(c), 27(1)(2),

49(1)(f)(i) & (11), 50(2), 59 and 159(2)(b) OF THE CONSTITUTION

AND

IN THE MATTER OF HIGH COURT CRIMINAL APPEAL NO. 42 OF 2016 AT KITUI HIGH COURT

AND

IN THE MATTER OF CRIMINAL CASE FILE NO. 81 OF 2015

AT KYUSO LAW COURTSUNDER SECTION 19(2)

BETWEEN

MUTUA MUSAU.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

R U L I N G

1. **Mutua Musau,** the Applicant has approached this Court by way of Notice of Motion seeking a new trial and issuance of habeas corpus. His argument is that some of the grounds he raised on Appeal were not considered. He therefore urged the Court to exercise its power as enshrined in **Article 159(2)(a)** and **(b)** of the **Constitution.**

2. The Applicant urged the Court to review its Judgment to re-consider what to his mind was not considered.

3. In response, the State/Respondent through **Mr. Okemwa**, the learned Prosecution Counsel opposed the Application. He urged that the only avenue that was open to the Applicant was to prefer an Appeal against the Judgment instead of approaching the Court through the back door. He argued that the Court lacked locus to hear the prayer sought as he could only have approached the Court if there was new and compelling evidence as envisaged by **Article 50(6)** of the **Constitution.**

4. Regarding granting of habeas corpus, he pointed out that the Applicant was before Court, and having not disappeared such an order could not issue.

5. I have considered rival submissions of both parties.

6. The Applicant was convicted by the trial Court for the offence of being in possession of a firearm without a licence. With the **AK 47** were two (2) rounds of ammunition. After being taken through full trial, he was convicted and sentenced to **ten (10) years imprisonment.**

7. His first limb of Application is to have his Appeal re-heard. He is calling upon this Court to re-hear his Appeal. When this Court delivered its Judgment on the **12th** day of **April, 2018,** and informed the Appellant of his right of appeal, it was *functus officio.*

8. The principle of *functus officio* was considered by the Court of Appeal in the case of **Chandler vs. Alberta Association of Architects (1989) 25 CR 848** where **Sopinka J.** stated thus:

> ***"The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:***
>
> ***1. Where there had been a slip in drawing it up, and,***
>
> ***2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186."***

9. Having delivered a considered Judgment in this matter, I cannot be moved to re-open it for that would be sitting as an Appellate Court upon my own decision.

10. As correctly pointed out by the Respondent, the Applicant could have exploited the provisions of **Article 50(6)** of the **Constitution** in event that there was new and compelling evidence.

11. With regard to habeas corpus, such a command would require a person who is under arrest to be produced before the Judge/Court in order for his release to be secured unless it is shown that being detained is lawful. The Applicant is incarcerated because he was convicted and sentenced by a Court of Law. The detention in this regard is not unlawful.

12. From the foregoing, it is apparent that the Application is unmeritorious. Accordingly, it is dismissed.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of July, 2019.

L. N. MUTENDE

JUDGE