



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**HIGH COURT PETITION NO. 143 OF 2016**

**NZOMO KYANGI MUINDE.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The applicant herein, **Nzomo Kyangi Muinde**, was charged in the Senior Principal Magistrate's Court at Machakos with 6 Counts of Robbery with Violence Contrary to Section 296(2) of the *Penal Code*. He was found guilty of the said offence and was on 10<sup>th</sup> February, 2000 sentenced to death.
2. Being dissatisfied with the said decision the applicant appealed to this Court vide Criminal Appeals Nos. 99, 100 and 101 of 2003 (consolidated) and upon the hearing of his appeal, this Court (**Ojwang and Sitati, JJ**) on 18<sup>th</sup> May, 2007 dismissed the said appeals.
3. Once again the applicant as unhappy with the said decision and appealed to the Court of Appeal vide Nairobi Criminal Appeal No. 73 of 2007. That appeal was heard and by its judgement dated 24<sup>th</sup> January, 2014, the said Court allowed the appeal by the 2<sup>nd</sup> appellant therein but dismissed the appeal by the 1<sup>st</sup> and 3<sup>rd</sup> appellant. In the said appeal, the applicant herein, **Nzomo Kyange Muinde** was the 3<sup>rd</sup> appellant. On the face of the record therefore, the applicant's appeal was dismissed by the Court of Appeal.
4. The Petitioner has however filed the instant petition in which he avers that in arriving at the said previous decisions, he was not accorded an impartial trial in line with Articles 25(c) and 50(2) of the Constitution as read with section 77(1) of the retired Constitution. According to him the said Courts did not consider the violation of the provisions of section 169(i) and 169(2) of the *Criminal Procedure Code* and that while delivering their judgements, the said Courts did not consider the violation of section 65(8), 163(i)(c), 165, 107 and 111 of the *Evidence Act*. It was his case that the issue of mode of arrest circumstantial evidence (sic) was not considered.
5. Apart from the said alleged violations of the Constitution and the law, the Petitioner further averred that the Court of Appeal committed a grave mistake of law by acquitting or allowing the appeal of his co-accused by the name of **John Mutua Mutuku**, by relying on the evidence adduced against the Petitioner instead of allowing the Petitioner's appeal. It was the Petitioner's case that he was the right person to be acquitted.
6. Although the Petitioner raised many grounds in his Petitioner, the evidence adduced by way of supporting affidavit was directed only at the fact that the evidence which was relied upon to acquit the Petitioner's Co-accused was in fact evidence which was adduced against him hence it was him who ought to have benefited from the decision of the Court of Appeal.
7. In response to the Petition, **Ms Mogoi**, Learned State Counsel submitted that this Court has no jurisdiction to grant the orders sought herein as it would amount to this Court sitting on the decision of the Court of Appeal.
8. I have considered the issues raised herein as well as the submissions made. I agree with **Chitembwe, J** in Malindi Constitutional Petition No. 24 of 2015 that it is not mandatory that one must pursue his appeal all the way to the Supreme Court before filing a constitutional petition if matters constitutional require to be addressed.
9. However in this case what the Petitioner is contending is that the Court of Appeal applied the facts favourable to him to the case of his co-accused instead of his case. In other words, he contends that had the Court of Appeal properly addressed its mind as to whom the evidence that led to the acquittal of his co-accused ought to have been applied, it would have acquitted him instead of his co-accused.

10. Whereas the Petitioner may well be right, and I am not making any definite finding thereon, it is only the Court of Appeal that is empowered to interpret its own Judgement. In other words the matter before me is not a constitutional issue but, going by the Petitioner's case, is contemplated under rule 35 of the *Court of Appeal Rules*. The said Rule provides as hereunder:

**A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.**

11. In my view what the Petitioner is asking this Court to do is to interrogate the correctness of the decision of the Court of Appeal when it applied the facts to the appellant's case and to find that had it properly done so, it ought to have acquitted the Petitioner.

12. It is my view and I hold, as properly submitted by the Learned State Counsel that that is a jurisdiction reserved for the Court of Appeal under the slip rule or to the Supreme Court and not this Court. In *Bahadur vs. AG (1986) LRC Const 297* the court said:

**"The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution."**

13. As was held in *Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011*.

**"All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof"**

14. The Supreme Court in *Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 Other [2017] eKLR* stated that:

**"In an attempt to determine the matter before this Court, we have asked ourselves severally: *what is before us*" *What cause of action is being pursued herein by the applicant*" While the Supreme Court was created by the Constitution 2010 as the epitome of justice in our judiciary hierarchy, its jurisdiction is particularly provided for by Article 163 of the Constitution. The Court is given a specific mandate and its creation was not meant to open a *pandora's* box for all manner of applications, even where the cause of action is not discernible...Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books...Justice is sought and delivered within the set down legal parameters. This Court will not contravene the judicial hierarchy which is at the core of our judicial independence and competence in decision making... The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in Article 163(3) of the Constitution. One cannot ask the Court to exercise its powers in a *carte blanche* manner. A litigant's plea must be precise and targeted. One cannot make omnibus prayers to the Court with the expectation that the Court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the Court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy."**

15. It is similarly my view that this Court cannot under the pretext of upholding the Constitution invent a litigation trajectory that cannot be traced within the judicial hierarchy and make a decision whose effect would be to unlawfully overturn the decision of the Court of Appeal unless such avenue is expressly provided by the Constitution, an Act of Parliament or by judicial pronouncement. None has been cited in this case. In the above cited matter, the Court further held that:

**"Access to justice as a principle enshrined in the Constitution is not a blank cheque for all and sundry to bring all manner of 'applications' and 'matters' before the Court. Courts are constitutional creatures and exercise that jurisdiction only bestowed to them by the law (See *Samuel Kamau Macharia & another V Kenya Commercial Bank Limited & 2 others [2012] eKLR*). While the applicant comes at the disguise of seeking access to justice, the truth is that this application, because of being vexatious and frivolous, impedes the access to justice of others by clogging the judicial system and taking up this Court's precious judicial time that it would have used to hear other litigants with legitimate causes of action...This Supreme Court was not established as a Court where all manner of grievances and disgruntlements are to be entertained. To allow such a window to be open will itself defeat the purpose for the creation of the Court as provided for in the Constitution and particularly in section 3 of the Supreme Court Act, which outlines the objectives of the Court."**

16. That reasoning applies *mutatis mutandi* to the instant application.

17. The same Court opined in *Yusuf Gitau Abdalla vs. Building Centre (K) Ltd & 4 Others, Sup. Ct. Petition No. 27 of 2014; [2014] eKLR*, observed that it can only do justice within the legal framework and expressed itself as follows:

**“[16] This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant’s pestering. The Court’s mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court.”**

18. In the premises this Petition is incompetent for want of jurisdiction and is hereby struck out.

19. Orders accordingly.

**Judgement read, signed and delivered in open Court at Machakos this 18<sup>th</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Petitioner in person**

**Ms Mogoi for Respondent**

**CA Geoffrey**